(28,992)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 442.

CHARLES E. McGREGOR, PLAINTIFF IN ERROR,

vs.

GEORGE P. HOGAN, SHERIFF OF WARREN COUNTY, GEORGIA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	3	2
Order allowing writ of error	4	3
Petition for writ of error	5	4
Assignment of errors	7	5
Bond on writ of error	10	7
Præcipe for record	12	8
Record from the superior court of Toombs circuit	15	10
Bill of exceptions	15	10
Judgment	15	10
Exceptions	17	11
Agreed facts	19	13
Affidavit of S. E. Du Puis	20	14
F. H. Norris	21	15
C. R. Fitzpatrick	22	15
Certificate of clerk of superior court of Warren County.	22	15
Resolution of board of road commissioners	23	15
Statement of sole commissioner of roads for year 1920.	23	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 5, 1922.

	Original.	Print.
Affidavit of John T. Scruggs	24	16
C. R. Fitzpatrick	24	16
Denham Cason	27	18
W. A. Wright	27	18
W. E. English	27	19
Specifications of error	28	19
Judge's certificate to bill of exceptions	29	20
Clerk's certificate	29	20
Bill of complaint	31	20
Amended complaint	36	24
Answer of Scruggs	40	28
Answer of Johnson	41	28
Exhibit—Resolution, May 31, 1921	46	32
Answer of Johnson to amended complaint	49	34
Judgment	51	35
Clerk's certificate	53	36
Opinion, Hill, J	55	37
Judgment	74	48
Clerk's certificate	75	48

a Supreme Court of Georgia.

C. E. McGregor, Plaintiff in Error,

vs.

Hogan, Sheriff, et al., Defendants in Error.

1 United States of America, *ss:*

[Seal U. S. District Court, N. D. Georgia.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Charles E. McGregor, plaintiff in error, and George P. Hogan, sheriff of Warren County, Georgia, J. T. Scruggs, tax-collector of Warren County, Georgia; D. E. Johnson, commissioner of roads and revenues of Warren County, Georgia, C. A. Wheeler, H. F. Norris and G. A. Ray, Board of Tax-assessors of Warren County, Georgia, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground
2 of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity specially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Charles E. McGregor, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Wm. H. Taft, Chief Justice of the United States, the 26th day of May, in the year of our Lord one thousand nine hundred and twenty two.

O. C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Allowed by

WM. H. FISH,
Chief Justice of the Supreme Court
of the State of Georgia.

Filed in office this 26th day of May, 1922.

Z. D. HARRISON,
C. S. C. Ga.

[Endorsed:] Supreme Court of the United States, October Term, 191–. Writ of Error.

3 In Supreme Court of the State of Georgia, October Term, 1922.

UNITED STATES OF AMERICA, *ss:*

To George P. Hogan, sheriff of Warren County, Georgia; J. T. Scruggs, tax collector of Warren County, Georgia; D. E. Johnson, commissioner of roads and revenues of Warren County, Georgia; C. A. Wheeler, H. F. Norris, and G. A. Ray, board of tax assessors of Warren County, Georgia:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the Supreme Court of Georgia, wherein Charles E. McGregor, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf herein.

Witness the Honorable William H. Fish, Chief Justice of the Supreme Court of Georgia, this the 26 day of May, 1922.

WM. H. FISH,
Chief Justice of the Supreme Court of Georgia.

Due and legal service of the within citation and of the grant of the writ of error to the Supreme Court of the United States of America, in the case in said citation mentioned, is hereby acknowledged, and all other and further service and notice is hereby waived. This 26 day of May, 1922.

E. P. DAVIS AND
J. CECIL DAVIS,
Attorneys for George P. Hogan, Sheriff of Warren County, Georgia; J. T. Scruggs, Tax Collector of Warren County, Georgia; D. E. Johnson, Commissioner of Roads and Revenues of Warren County, Georgia; C. A. Wheeler, H. F. Norris, and G. A. Ray, Board of Tax Assessors of Warren County, Georgia.

Filed in office this the 26 day of May, 1922.
Z. D. HARRISON,
C. S. C. Ga.

4 In the Supreme Court of the State of Georgia, October Term, 1921.

CHARLES E. MCGREGOR, Plaintiff in Error,

vs.

GEORGE P. HOGAN, Sheriff of Warren County, Georgia; J. T. Scruggs, Tax Collector of Warren County, Georgia; D. E. Johnson, Commissioner of Roads and Revenues of Warren County, Georgia; C. A. Wheeler, H. F. Norris, and G. A. Ray, Board of Tax Assessors of Warren County, Georgia, Defendants in Error.

Decided and Judgment Affirmed May 19, 1922.

On this the 26 day of May, A. D. 1922, came on to be heard the application of Charles E. McGregor, for a writ of error in the above stated case, and it appearing that the application ought to be granted, it is therefore ordered, that the writ of error be allowed, the plaintiff in error giving a bond conditioned as the law directs in the sum of One thousand dollars, which is to operate as a supersedeas, and that a true copy of the record, assignment of errors, and all proceedings that were had in the case in the Supreme Court of the State of Georgia shall be transmitted to the Supreme Court of the United States properly certified as the law directs that the said Court may inspect the same and do what according to law should be done.

WM. H. FISH,
Chief Justice of the Supreme Court of Georgia.

Filed in office this 26 day of May, 1922.
Z. D. HARRISON,
C. S. C. Ga.

5 In the Supreme Court of the State of Georgia, October Term, 1921.

CHARLES E. McGREGOR, Plaintiff in Error,

vs.

GEORGE P. HOGAN, Sheriff of Warren County, Georgia; J. T. Scruggs, Tax Collector of Warren County, Georgia; D. E. Johnson, Commissioner of Roads and Revenues of Warren County, Georgia, C. A. Wheeler, H. F. Norris, and G. A. Ray, Board of Tax Assessors of Warren County, Georgia, Defendants in Error.

Decided and Judgment Affirmed May 19, 1922.

UNITED STATES OF AMERICA, *ss:*

To the Honorable the Chief Justice of the Supreme Court of the State of Georgia:

Now comes Charles E. McGregor, the above named plaintiff in his error, by his attorneys, L. D. McGregor and Virgil E. Adams, and complain and allege that in the above entitled matter, to-wit: the case of Charles E. McGregor, plaintiff in error, v. George P. Hogan, sheriff of Warren County, Georgia, J. T. Scruggs, Tax collector of Warren County, Georgia, D. E. Johnson, Commissioner of roads and revenues of Warren County, Georgia; C. A. Wheeler, H. F. Norris, and G. A. Ray, board of tax-assessors of Warren County, Georgia, defendants in error, on the 19 day of May, 1922, final judgment was rendered against petitioner by the Supreme Court of the State of Georgia, in which final judgment and the proceedings had prior thereunto in said cause certain errors were committed to the prejudice of said Charles E. McGregor, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That said Supreme Court of the State of Georgia is the highest Court of the State of Georgia, in law or in equity in which a decision in this suit and in this matter could be had.

The plaintiff in error Charles E. McGregor, further show that in said action there was drawn in question the validity of a statute
6 of, and authority exercised under the State of Georgia, on the ground of their being repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State of Georgia, was in favor of their validity, as will appear from the record, proceedings, decision and final judgment in said Supreme Court of the State of Georgia.

Wherefore, the said Charles E. McGregor, pray that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Georgia for the correction of the errors so complained of, and that a transcript of the record,

proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

This 26 day of May, 1922.

L. D. McGREGOR,
VIRGIL E. ADAMS,
Attorney- for Petitioner.

Filed in office May 26, 1922.
Z. D. HARRISON,
C. S. C. Ga.

7 In the Supreme Court of Georgia, October Term, 1921.

CHARLES E. McGREGOR, Plaintiff in Error,

vs.

GEORGE P. HOGAN, Sheriff of Warren County, Georgia; J. T. Scruggs, Tax Collector of Warren County, Georgia; D. E. Johnson, Commissioner of Roads and Revenues of Warren County, Georgia, C. A. Wheeler, H. F. Norris, and G. A. Ray, Board of Tax Assessors of Warren County, Georgia, Defendants in Error.

Decided and Judgment Affirmed May 19, 1922.

Assignment of Errors.

Now comes Charles E. McGregor, the said plaintiff in error, and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of Georgia, in the above stated matter, there is manifest error in that, to-wit:

First. That the court erred in holding and deciding that the sixth section of the Tax Equalization Act of the State of Georgia, being an Act of the General Assembly of Georgia, approved August 14th 1913, (found in the Georgia Laws for 1913 pages 123 et seq.) and especially so much of said section of said act as provides, that, "When any corrections, changes and equalizations shall have been made by said board, it shall be the duty of the board to immediately give notice to any tax payer of any changes made in his returns, either personally or by leaving same at his residence or place of business, or, in case of non-resident of the county, by sending said notice through the United States mail to his last known place of address," (a decision to be made without giving the tax payer any opportunity to be heard on the question of the value of the property before the tribunal that makes the assessment of the value of
8 the property), is not void because it is violative of that portion of the fourteenth amendment of the Constitution of the United States wherein it is provided that, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.

Second. That the court erred in affirming the judgment of the superior court of Warren County, Georgia, in holding that the said statute and the portion thereof complained of are constitutional and does not deprive the plaintiff of his property without due process of law.

Third. That the court erred in holding and deciding that, notwithstanding the plaintiff in error had not had an opportunity to be heard before the county board of assessors on the question of the value of his property for taxation, and notwithstanding the statute in question makes no provision for such a hearing before the county board of tax-assessors, and notwithstanding it is this decision or finding of the board of county tax-assessors which is being enforced against the plaintiff in error and his property, and notwithstanding such enforcement is in pursuance of the provision of said statute, and notwithstanding that the only provisions for an appeal or review of said decision or finding of said board of county tax-assessors is by demand for an arbitration, (and which provision was decided by the Supreme Court of the United States to be unconstitutional in the case of Turner et al. vs. Wade, Sheriff, at the October Term, 1920, upon the 8th day of November, 1920; and notwithstanding the statute in question makes no other exception whereby the question of the value of the property for taxation could be determine- after opportunity for hearing, and by its terms makes the ex parte decision
or finding of the county board of tax-assessors conclusive and
9 binding without an opportunity to be heard by the plaintiff,
and that notwithstanding all of this is in pursuance of the statute itself, and the statute is being enforced in the case presented as made, the statute and especially that portion of the same which is thus being enforced is not unconstitutional as being violative of that portion of the fourteenth amendment to the Constitution of the United States which forbids any State from *makes* or enforcing any law which deprives any person of his property without due process of law.

L. D. McGREGOR,
VIRGIL E. ADAMS,
Attorneys for Plaintiff in Error, Charles E. McGregor.

Filed in office this May 26, 1922.

Z. D. HARRISON,
C. S. C. Ga.

10 In the Supreme Court of the State of Georgia, October Term, 1921.

CHARLES E. McGREGOR, Plaintiff in Error,

vs.

GEORGE P. HOGAN, Sheriff of Warren County, Georgia; J. T. Scruggs, Tax Collector of Warren County, Georgia; D. E. Johnson, Commissioner of Roads and Revenues of Warren County, Georgia; C. A. Wheeler, H. F. Norris, and G. A. Ray, Board of Tax Assessors of Warren County, Georgia, Defendants in Error.

Know all men by these presents, that we, Charles E. McGregor, plaintiff in error, as principal, and J. C. Evans, as surety, are held and firmly bound unto George P. Hogan, Sheriff of Warren County, Georgia, J. T. Scruggs, Tax-collector of Warren County, Georgia, D. E. Johnson, Commissioner of Roads and Revenues of Warren County, Georgia, C. A. Wheeler, H. F. Norris and G. A. Ray, Board of Tax-assessors of Warren County, Georgia, in the sum of one thousand dollars, to be paid to the said obligees, their successors, representatives and assigns, to the payment of which to be well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these present.

Sealed with our seal and dated this the 26 day of May, 1922.

Whereas, the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Georgia.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ of error to effect and answer all cost and damages if he should fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHARLES E. McGREGOR. [L. S.]
J. C. EVANS. [L. S.]

11 Honorable William H. Fish, Chief Justice of the Supreme Court of Georgia:

The attached and foregoing bond and the surety thereon, tendered by the plaintiff in error in the case of Charles E. McGregor vs. George P. Hogan, Sheriff et al., is satisfactory.

E. P. DAVIS,
J. CECIL DAVIS,
Attorneys for George P. Hogan, Sheriff of Warren County, Georgia; J. T. Scruggs, Tax Collector of Warren County, Georgia; D. E. Johnson, Commissioner of Roads and Revenues of Warren County, Georgia; C. A. Wheeler, H. F. Norris, and G. A. Ray, Board of Tax Assessors of Warren County, Georgia.

The within and foregoing bond tendered by Charles E. McGregor, as principal and J. C. Evans as surety, as well as the surety thereon, is hereby approved and ordered to operate as a supersedeas. This the 26 day of May, 1922.

WM. H. FISH,
Chief Justice of the Supreme Court of Georgia.

Filed in office May 26, 1922.
Z. D. HARRISON,
C. S. C. Ga.

12 In the Supreme Court of the State of Georgia, October Term, 1921.

CHARLES E. MCGREGOR, Plaintiff in Error,

vs.

GEORGE P. HOGAN, Sheriff of Warren County, Georgia, J. T. Scruggs, Tax Collector of Warren County, Georgia; D. E. Johnson, Commissioner of Roads and Revenues of Warren County Georgia; C. A. Wheeler, H. F. Norris, and G. A. Ray, Board of Tax Assessors of Warren County, Georgia, Defendants in Error.

To the Clerk of the Supreme Court of Georgia:

Please make transcript of the following named portions of the record in the above entitled matter and transmit to the Supreme Court of the United States in connection with the writ of error from the Supreme Court of the United States to the Supreme Court of Georgia therein:

1. The original petition of Charles E. McGregor and the amendment thereto.

2. The original answer of D. E. Johnson, Commissioner of Roads and Revenues of Warren county Georgia, and the amendment thereto; the original answer of J. T. Scruggs, Tax-Collector of Warren County, Georgia; the original answer of George P. Hogan sheriff of Warren County Georgia; the original answer of C. A. Wheeler, H. F. Norris, and G. A. Ray, Board of Tax-Assessors of Warren County Georgia.

3. The Bill of exceptions presented and filed by Charles E. McGregor which contains all of the evidence submitted in the entitled matter and which contains also the judgment of the Superior Court of Warren County Georgia rendered July Term 1921 in which judgment the plaintiff was denied an injunction and the tax equalization act of the State of Georgia 1913 pages 123 et. seq. was held constitutional, together with certificates of the judge and entries of filing thereon.

13 4. The decision and judgment of the Supreme Court of Georgia, which was rendered upon the 19th day of May, 1922.

5. The petition for writ of error from the Supreme Court of the United States to the Supreme Court of Georgia.

6. The assignments of error filed in connection with said petition.

7. The order of the Chief Justice of the Supreme Court of Georgia allowing the writ of error.

8. The writ of error.

9. The citation to the defendants in error and entries thereon.

10. The bond given by the plaintiff in error.

11. This præcipe for transcript.

L. D. McGREGOR,
VIRGIL E. ADAMS,
Attorneys for Plaintiff in Error.

This 26 day of May, 1922.

Due and legal service of the foregoing præcipe is acknowledged, copy received, and further service waived, this 26 day of May, 1922.

E. P. DAVIS,
J. CECIL DAVIS,
Attorneys for George P. Hogan, Sheriff of Warren County, Georgia; D. E. Johnson, Commissioner of Roads and Revenues of Warren County, Georgia; J. T. Scruggs, Tax Collector of Warren County, Georgia; C. A. Wheeler, H. F. Norris, and G. A. Ray, Board of Tax Assessors of Warren County, Georgia, Defendants in Error.

Filed in office this the 26 day of May, 1922.
Z. D. HARRISON,
C. S. C. Ga.

14 No. 2743. McGregor v. Hogan, Sheriff, et al. Bill of Exceptions and Transcript of Record.

15 GEORGIA,
Warren County:

Be it remembered that on the 31st day of May, 1921, there came on to be tried before the Honorable E. T. Shurley, Judge of the Superior Courts of the Toombs Circuit, of which said County forms a part, the case of C. E. McGregor against the Sheriff of Warren County, G. P. Hogan, the tax-collector of Warren County, J. T. Scruggs, the Commissioner of Roads and Revenues of Warren County, D. E. Johnson, and the County Board of Tax-Assessors of Warren County, C. A. Wheeler, H. F. Norris and G. A. Ray, the same being an application on the part of the plaintiff for an injunction against the defendants.

The Defendants having been served and filed their answers in said case, and all of the parties having announced ready, the plaintiff introduced evidence to support the allegations of his petition and amendment thereto, and the Defendants introduced evidence to support their answers and amendment, and after argument had thereon, his Honor E. T. Shurley, judge, presiding, reserved his decision and judgment in said case until the 28th day of June 1921, at which time he passed and entered up the following judgment to-wit:

"1st. That the injunction prayed for in said petition on the constitutional grounds therein alleged and all other grounds, except as against the tax levy for 1920, and the tax fi. fa. issued thereon against the plaintiff is hereby denied."

"2nd. The injunction as prayed against the tax levy of the commissioner of Warren County for the year 1920, is hereby granted, and the Court being of the opinion that the tax fi. fa. in the hands of G. P. Hogan, Sheriff of said County, sought to be enjoined, having been issued when there was no legal tax levy for the County for the year 1920, the said G. P. Hogan, Sheriff of said County, should also be enjoined from proceeding to levy or collecting said tax
16 fi. fa.; It is therefore ordered, considered and adjudged that the said D. E. Johnson, Commissioner, and the said G. P. Hogan, Sheriff, be and they are hereby enjoined from collecting said tax fi. fa. now in the hands of G. P. Hogan, Sheriff and which is sought to be enjoined by petitioner."

"3rd. It is further ordered that D. E. Johnson, Commissioner be permitted and he is hereby permitted and ordered to amend the tax levy for the year 1920, in the manner he prays to do in his answer and in accordance with the proposed amendment set out and attached to his answer, and that said tax levy as amended be by him placed

on the minutes of the Commissioner of Warren County, Georgia, and published as provided by law."

"4th. It is further ordered that after the said D. E. Johnson, Commissioner has amended the tax levy for the year 1920, in accordance with his prayer as set out in his answer, that the tax collector of Warren County, John T. Scruggs, issue a new fi. fa. based on said levy as amended."

"When the said D. E. Johnson, Commissioner, has amended the tax levy for the year 1920, in accordance with his prayer as set out in his answer, and in accordance with the proposed amendment of said tax levy attached to his answer, and the same is placed on the minutes of said Commissioner, and the tax collector John T. Scruggs, has issued a new fi fa based on the said tax levy as amended as herein ordered, then the said Commissioner and Sheriff are hereby authorized to proceed and collect said taxes due for the year 1920, under and by virtue of the new tax fi. fa. unrestrained and unhampered by the injunction this day granted, restraining and enjoining the collection of the taxes due by plaintiff under and by virtue of the fi. fa. issued on the — day of ——, 1921, under the original tax levy for Warren County Georgia, for the year 1921, it being the intention of this order to restrain said Commissioner and Sheriff from further proceeding under the fi. fa. now issued."

17 "This 28th day of June, 1921.

E. T. SHURLEY,
Judge Superior Courts of Toombs Circuit."

To the above and foregoing Judgment of the Court in the above and foregoing stated case, C. E. McGregor, plaintiff, then and there excepted, and now excepts, and assigns the same as error as being contrary to law upon the following grounds, to-wit:

(a) Because, section six of the Tax Equalization Act of the State of Georgia, being an Act of the General Assembly of Georgia, approved August 14th, 1913 (found in Georgia Laws for 1913, page 123 et seq.), does not provide for any notice to the taxpayer before the assessment is made by the tax-assessors, nor opportunity given the taxpayer to be heard as of right before the assessment became final against him, and therefore, as applied to the facts of this case, denied to the complaining taxpayer due process of law as guaranteed to him by the 14th Amendment of the Constitution of the United States which provides, as follows, to-wit:

"Nor shall any State deprive any person of life, liberty, or property without due process of law."

And denied to the complaining taxpayer due process of law as guaranteed to him by Article 1, Section 1, Paragraph 3, of the Constitution of the State of Georgia, which provides as follows, to-wit:

"No person shall be deprived of life, liberty, or property except by due process of law."

(*b*) Because, the original statement which was contended was a legal tax levy and subject to the proposed amendment was absolutely null and void and could not be amended.

(*c*) Because, the proposed amendment to the tax levy as
18 allowed by the Judge, was illegal, in that, the Commissioner of Roads and Revenues of Warren County, could not legally levy more than 100 per cent. of the State Tax to pay the accumulated debts and current expenses and four tenths (4/10) of one per cent. to build and repair the public roads of said County, whereas, the proposed amended tax levy and which was allowed by the Court, did levy a tax of sixteen (16) mills in addition to the State tax of five (5) mills, which levy was excessive and therefore illegal.

(*d*) Because, the Board of Commissioners of Roads and Revenues in and for said County of Warren, did adopt upon the 2nd day of May, 1905, the "Alternative Road Law" as contained in sections 694 to 704 inclusive of the Code of 1910 of Georgia, for the building, repairing and working and maintaining the public roads of said County, and levying a tax to build, repair, work and maintain the public roads of said County, and the Commissioner of Roads and Revenues of Warren County was authorized under said Alternative Road Law to levy a tax of four tenths (4/10) of one per cent, for the working, repairing, building and maintaining the public roads of said County and no more, whereas, said amendment to the tax levy illegally gives to the Commissioner of Roads and Revenues of said County the right to levy a total tax of 245.916 per cent. of the State's Tax for building, repairing, and maintaining the public roads of said County, which amount is in excess of the legal amount authorized to be levied for such purpose.

(*e*) Because, the amendment to the tax levy allowed by the Court was illegal and excessive, in that, approximately eight thousand ($8,000.00) Dollars had been collected from those Citizens of said County who were subject to and liable for a commutation tax under and by virtue of the said Alternative Road Law for the year 1920, and after deducting this amount from the total sum of $42,753.32, which was claimed as the expense incurred in maintaining the chain-gang, building, repairing and maintaining the public roads, left only the sum of $34,753.32 to be collected for the purpose
19 of maintaining the chain-gang, building, repairing and maintaining the public roads, for the year 1920.

(*f*) Because, the original tax levy was illegal, null and void, in that, it was too indefinite and uncertain to be amended, as there was nothing to amend.

(*g*) Because, the original tax levy was illegal, null and void, in that, the same was never published in any public gazette, nor published at the Court house door, nor entered upon the minutes of the Commissioner of Roads and Revenues of said County, as required by law.

C. E. McGregor, names himself as plaintiff in error, and Sheriff of Warren County, G. P. Hogan, Commissioner of Roads and Revenues, of Warren County, D. E. Johnson, Tax-collector of Warren County, John T. Scruggs, and Tax-assessors of Warren County, C. A. Wheeler, H. F. Norris, and G. A. Ray, as Defendants in error, in this bill of exceptions.

Plaintiff in error sets out next hereinafter the evidence adduced on said hearing, to-wit:

The following facts were agreed upon between all attorneys representing all parties in said case, to-wit:

"1st. That petitioner returned his 2907 acres of land to the tax receiver of Warren County, Georgia, at $12,500.00, and that the County Tax Assessors without previous notice or hearing to him raised said assessment from $12,500.00 to $23,256.00.

2nd. That after the County Tax assessors *has* so raised the tax assessment of your petitioner from $12,500.00 to $23,256.00 they made a note of the same, attaching to it his return, and notified him personally of such increase.

3rd. That the County Tax assessors, in raising the tax assessment of the petitioner, did not act under any order of the State Tax Commissioner by which the per centum of taxation on all of the property of the County was increased but they did act under the authority given them by the Georgia Tax Equalization Act as contained in Section 1116 and sub-divisions *g, h, i, j, k, l, m, n, o,* and *p,* and it is further agreed that the State Tax Commissioner by letter to the chairman of the County Tax assessors ordered the County Tax Assessors to increase the tax returns of such individual taxpayers of the county as in their judgment was too low.

4th. That the taxable property of the county as shown by the tax digest of Warren County for 1920 is $3,476,074.00 and that the form of tax levy of the Commissioner of Warren County for 1920 was as follows:

"Sixteen dollars per thousand on $3,476,074.00 will net $55,-616.00."

5th. That an execution for County and State Tax was delivered for the taxes against petitioner as alleged in the petition and was placed in the hands of the Sheriff of Warren County, Georgia, who threatened to levy the same upon the property of petitioner.

6th. It is agreed that the Commissioner of Warren County is now and was in 1920 working both felony and misdemeanor convicts on the public roads of Warren County.

7th. That all taxpayers of Warren County, Ga., have paid their taxes for year 1920 except the petitioner and those against whom tax executions have been issued.

8th. That the tax levy of 1920 for Warren County, Ga., was not posted or published at the Court house door nor published in any Gazette in the County during the year 1920.

Plaintiff in error read in evidence the affidavit of S. E. Du Puis, the material portion- of which read as follows:

"That S. E. Du Puis was Secretary of C. R. Fitzpatrick, the sole commissioner of roads and revenues for the County of Warren during the year 1920, and as such did perform all the clerical duties of issuing County warrants or vouchers upon the County De-
21 pository, to-wit, the Citizens Bank, of Warrenton, Ga., for the payment of Warren County's indebtedness and obligation during the entire year of 1920. That the following is a true and correct form of the vouchers or warrants that were issued by deponent, during the entire year 1920, to-wit:

Office of

Road Commissioner of Roads and Revenues,

Warren County, Georgia.

No. —. Warrenton, Ga., —— —, 19—.

To County Treasurer:

Pay out of the County fund to Mr. —— —— the sum of — Dollars, for —.

By order of the Board of Commissioners.

—— ——,
Clerk.

$—.

Received of —— ——, Treasurer, — Dollars in full of the above order.

—— ——.

Warrenton, Ga., —— —, 19—.

That the entire funds of the County of Warren for the year 1920, *was* deposited in one general fund, and that all warrants were drawn against that one general fund."

"That said C. R. Fitzpatrick as such sole commissioner did not keep, maintain or use, or entered any of his actings and doings as such sole commissioner of roads and revenues for said county upon a minute book or books. That this deponent did not keep, maintain, use or enter any of the actings — doings of the said sole commissioner of roads and revenues of said county on a minute book or books.

That the tax levy made by the sole commissioner of roads and revenues for the year 1920 for Warren County, was never recorded or entered upon any minute book or minute books, because none was used by said commissioner nor his secretary."

Plaintiff introduced the affidavit of H. F. Norris in evidence the material portions of which read as follows:

"H. F. Norris was one of the tax assessors in and for the
22 county of Warren during the year 1920, did act as such in increasing the assessment and valuation of the lands of C. E. McGregor, for taxation for the year 1920.

That the tax assessors in increasing the valuation of the assessment upon the lands of C. E. McGregor acted upon their own judgment and opinion, without any order, or demand or requirement of the State Tax Commissioner of Georgia.

That the State Tax Commissioner of Georgia did not increase the valuation or assessment of the lands of the taxpayers of Warren County for the year 1920, so far as this deponent knows, over and above the increased assessment and valuation placed upon the lands by the tax assessors of Warren County."

Plaintiff introduced the affidavit of C. R. Fitzpatrick in evidence the material portion- of which read as follows:

"C. R. Fitzpatrick was the sole commissioner of roads and revenues in and for Warren County during the year 1920, and that to the best of his knowledge and belief there was collected during the year 1920, approximately eight thousand ($8,000) Dollars commutation tax from the citizens of Warren County, who were subject to the payment of such a tax, which tax was collected for the purpose of defraying the expenses incurred in working the public roads of said county as far as it would go during the year 1920."

Plaintiff introduced in evidence the certificate of A. E. Massengale, Clerk of the Superior Court of Warren County, Georgia, which material portion read as follows:

"GEORGIA,
Warren County:

I, A. E. Massengale, Clerk of the Superior Court of Warren County, Georgia, do hereby certify that there does not appear in the presentments of the Grand juries of Warren County, Georgia, for the years 1919 and 1920, as of file and recorded upon the minutes
23 of the superior court of Warren County, Georgia, any recommendation or reference whatsoever to any rate of tax to be assessed or levied by the County Commissioner of Roads and Revenues of said County, even though the presentments of the Grand juries for the years 1919 and 1920 are recorded upon the minute book of the Superior Court of said County."

Plaintiff introduced in evidence the resolution of the Commissioners of Roads and Revenues of Warren County showing the adoption of the Alternative Road Law which was as follows:

"May 2nd, 1905.

Resolved that we, the Board of Commissioners of Warren County, in obedience of the recommendation of several Grand juries of Warren County, adopt for said County of Warren the Alternative Road Law as embraced under sections 573 and 583 of the Political Code, and all amendments thereto so far as applicable and that this resolution in regard to working the roads of Warren County by Taxation operates as an amendment to our previous resolution in regard to working the roads of Warren County by taxation."

Plaintiff introduced the minute books of the Commissioners of Roads and Revenues of Warren County, Georgia, which did not show that the Alternative Road Law had ever been repealed, abolished or discontinued as the means of working the public roads of Warren County.

Plaintiff introduced in evidence the statement of the Sole Commissioner of Roads and Revenues for the year 1920 of Warren County, Georgia, which material portion was as follows:

"Interest on borrowed money for year 1920.....	$4.257.61
" " " " " " 1919.....	2,432.34
Money illegally expended for interest.....	$6,689.95
"Cement for Bridge.....	934.20
Golden Creek Bridge (labor done).....	997.50
Purchased 2 iron bridges.....	965.12
Labor bridge over creek.....	864.50
Money illegally spent for building bridges.....	$3,761.32

Plaintiff introduced in evidence the sworn petition and
24 the sworn amendment thereto, which is of record in the case.

The Defendant in error introduced in evidence the affidavit of John T. Scruggs, the material portion of which was as follows:

"John T. Scruggs is the tax collector of Warren County, Georgia, duly elected qualified and acting. That the tax fi. fa. amounting to eight hundred and thirty eight dollars and three cents, delivered to G. P. Hogan, Sheriff of Warren County, Georgia, against C. E. McCregor for taxes due during the year 1920, represented and included bot- the tax due the County of Warran and Tax due the State of Georgia by the said C. E. McCregor for the year 1920."

The Defendants in error introduced in evidence the affidavit of C. R. Fitzpatrick which material portion was as follows:

"C. R. Fitzpatrick was the sole commissioner of roads and revenues for Warren County, Georgia, in 1920. That as such commissioner he made the tax levy for 1920, copy of which is as follows:

"$16.00 per thousand on $3,476,074.00 will net $55,616.00," and that the above amount of $16.00 per thousand was fixed as the County tax rate for 1920. That no levy of four mills upon the taxable property of the county was levied as provided for under the alternative road law, section 696 of the Code. On the contrary Warren County was working its roads by State convicts under the Act of 1908 apportioning the convicts to the various counties of the State. That by the Act of the 19th day of August, 1919, abolishing the County Board of Commissioners for Warren County, and appointing a commissioner of roads and revenues for Warren County, provided for a salary for the commissioner of twelve hundred dollars, for secretary four hundred dollars, and for a superintendent of roads at a salary not to exceed eighteen hundred dollars, all of which extra
25 expense had to be taken care of by an ample tax levy, as he construed this Act to carry with it sufficient authority to put it into operation.

That the State Highway Department in the Spring or early part of 1920, was contemplating, and, perhaps, at that time surveying four State Aid Roads, radiating from Warrenton to Jewell, one from Warrenton to the County line beyond Barnett, one from Warrenton to the McDuffie Line on the road leading to Thomson, and one from Warrenton to Glascock County line on the road leading to Gibson, and that the obligation was on Warren County under the State Highway Act to furnish the right of ways for these State Aid Roads. That the policy of the State Highway Department in the building of these highways was to straighten them, cutting off sharp curves and angles, etc., and to reduce the grades, which necessitated and will necessitate large expenses in the purchase of right-of-ways in straightening these roads, and avoiding grades, all of which was contemplated and had to be taken care of in the tax levy for 1920. It has turned — that up to now, and up to the time of Fitzpatrick's resignation, deponent as commissioner of Warren County incurred but little expense in the purchase of right-of-ways for the State Aid Roads though did have to purchase some right-of-ways in building the ordinary Count Roads. Deponent further says that in the fall of 1919, when he became commissioner, and soon thereafter, realizing the great necessity of good roads, and having a natural pride in building them, he greatly enlarged the number of convicts that Warren County had on hand and during most of 1920 Warren County worked from twenty five to thirty convicts, deponent turning over to his successor some months ago thirty one convicts who were at work on the public roads of Warren County, practically twice as many as the county was working when he went into office. That machinery necessarily had to be purchased to work the roads and the efficiency of the chaingang was greatly increased and that
26 four mills on the taxable property of Warren County under the Alternative Road Law, which was not levied, would have hardly more than paid the guard hire, salaries, medical bills, etc., for the chain gang. Deponent further says that Mr. J. H. Fullbright, the State Tax Commissioner, did not order any per centum

increase against the taxable property of Warren County, Georgia as a unit but did order the County Tax Assessors to increase the tax assessment of any tax payer of the county whose return in their judgment was too low, and that the County Tax assessors were acting under this order when they increased petitioner's tax return. That during the year 1920 there was actually spent the sum of $42,753.32 *dollars,* for road purposes for Warren County, Georgia, all of which was legitimately spent and which included some legal and authorized warrants of the county past due. That the cost of food, clothing, medicine bills, machinery, mules, gasoline, and the cost of all other articles and materials necessary to work the roads, including lumber, were greater than in the history of this country and that said chain gang was run as cheaply and as economically as it could have been run during the year 1920, though it can be run cheaper now. There was actually expended for all County purposes for the year 1920 the sum of $63,310.07 and the tax levy provided for $67.216.00 which was ample, had it all been paid, to have taken care of all the expenses."

"That while I was commissioner of Roads and Revenues of Warren County Georgia, and in 1920, and up to the time of my resignation, I did not build any bridges or do any other work on the roads by contract and such work was done on the roads either in building or repairing bridges, was done by the chain gang and that no bridge or culvert cost as much as three hundred dollars. The County needed considerable cement in building culverts and for other purposes and that I lent the City of Warrenton, while commissioner,
some cement to build a bridge near the limits of the City of
27 Warrenton and for which the City of Warrenton reimbursed
the County. That no work was done on the roads or otherwise while deponent was commissioner that should have been let out to the lowest bidder under contract. That the county chain gang done all the work."

Defendant in error introduced in evidence the affidavit of Denham Cason which material portion is as follows:

"That for some years prior to 1920, I was one of the Commissioners of Roads and Revenues of Warren County Georgia, and that as such commissioner I know and swear that several years prior to 1920 Warren County worked its roads by chain gang, working both felony and misdemeanor convicts, and that while said roads of Warren County were worked by the chain gang no taxe was ever levied by the commissioners for the working of said roads under the Alternative Road Law."

Defendants in error introduced in evidence the affidavit of W. A. Wright, which material portion was as follows:

"That for some years prior to 1920, I was one of the Commissioners of Roads and Revenues of Warren County, Georgia, and that as such commissioner I know that several years prior to 1920 Warren County worked its roads by chain gang, working both felony

and misdemeanor convicts, and that while said roads of Warren County were worked by the chain gang no tax was ever levied by said commissioners for the working of said roads under the Alternative Road Law."

Defendant in error introduced in evidence the affidavit of W. E. English, which material portion was as follows:

"That for some years prior to 1920, I was one of the Commissioners of Roads and Revenues of Warren County, Georgia, and that as such commissioner I know and swears that several years prior to 1920 Warren County worked its roads by chain gang, working both felony and misdemeanor convicts, and that while said roads of Warren County were worked by a chain gang no tax was ever levied by said commissioners for the working of said roads under
28 the Alternative Road Law. That there are at present only three members of the Board of commissioners of Roads and Revenues of Warren County Georgia, for 1919 living.

Defendants in error introduced the sworn pleas and answers, which are a part of the record.

Plaintiff in error comes now on this the 15th day of June 1921, and present to his Honor, the Honorable E. T. Shurley, Judge, who presided in said case, this his bill of exceptions, the same being within twenty days from the passing and entering up of said judgment above set forth in said case and within the time prescribed by law, and asks that the same be signed and certified according to the statute in such cases made and provided, in order that said case may be carried up to the Supreme Court of Georgia, that the errors therein set out and alleged may be considered and corrected by that Court.

Plaintiff in error specifies as material to a clear understanding of the errors complained of, the following portions of the record, to-wit:

1. The petition, date of filing thereon.

2. The amendment to the petition together with the order allowing the same.

3. The temporary restraining order thereon.

4. The answer of each and every Defendant, date of filing thereon.

5. Amendment to the answer of D. E. Johnson, Commissioner of Roads and Revenues, and the order allowing the same.

6. The judgment of the Court entered upon the 28th day of June, 1921, in the above stated case.

Plaintiff in error most respectfully submits this his bill of exceptions.

L. D. McGREGOR,
Attorney for Plaintiff in Error.

P. O. Address: Warrenton, Ga.

29 *Certificate.*

I do certify that the foregoing bill of exceptions is true, and contains all of the evidence, and specifies all of the record material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Warren County is hereby ordered to make out a complete copy of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the Supreme Court, that the errors alleged to have been committed may be considered and corrected. This the 15 day of July, 1921.

E. T. SHURLEY,
Judge of the Superior Courts of Toombs Circuit.

Due and legal service of the within bill of exceptions is hereby acknowledged, copy and all other and further notice and service waived. This 15 day of July, 1921.

E. P. & J. CECIL DAVIS,
Attorneys for Defendants in Error.
E. P.

P. O. Address: Warrenton, Ga.

I hereby certify that this is the original Bill of Exceptions filed in the Clerk's Office Superior Court of Warren County, Ga., on the 15th day of July, 1921, in the case of C. E. McGregor, vs. G. P. Hogan Sheriff Warren Co. et al.

[SEAL.] A. E. MASSENGALE,
Clerk Sup. Court, Warren County.

30 (Endorsement:) No. —. Bill of Exceptions. Supreme Court. C. E. McGregor, Plaintiff in Error, vs. The Sheriff of Warren County G. P. Hogan et al., Defendants in error. Filed in office this the 15th day of July, 1921. A. E. Massengale, Clerk.

(Endorsement:) Case No. 2743. October Term, 1921. Supreme Court of Georgia. McGregor versus Hogan, sheriff, et al. Bill of Exceptions. Filed in office Jul. 25, 1921. W. E. Talley, D. C. S. C. Ga.

31 STATE OF GEORGIA,
Warren County:

To the Superior Court of said County:

C. E. McGregor, in his own behalf and interest, and in behalf and the interest of such other taxpayers of Warren County, Georgia, who are samilarly situated, files this his bill in equity, and shows the following facts:

1. That Your petitioner is a resident and taxpayer of Warren County, Georgia.

2. That the Sheriff of Warren County is G. P. Hogan and is a resident of said County.

3. That the tax collector of Warren County is J. T. Scruggs, and is a resident of said County.

4. That the Commission of Roads and Revenues of Warren County is D. E. Johnson, and is a resident of said County.

5. That the County Board of Tax Assessors of said County is C. A. Wheeler, H. F. Norris and G. A. Ray, each of whom are residents of said county.

6. That upon the 24th day of April, 1920, Your petitioner executed and delivered to the Tax Receiver of Warren County, to-wit: C. L. Cason, a tax return of all his real and personal property situated in said county subject to being taxed for the year 1920, a portion of said real estate of Your Petitioner consisted of two thousand nine hundred and seven (2,907) acres of land, which Your petitioner returned for taxation at the valuation of twelve thousand and five hundred dollars, ($12,500.00) and which return was the "true market value" of same.

7. That the aforesaid County Tax Assessors of said County, did upon the — day of ——, 1920, meet without having notified your petitioner or without giving your petitioner any notice of any kind or character of such meeting, and did without the knowledge of your petitioner, raise and increase the valuation upon the said two thousand nine hundred and seven (2,907) acres of land "the true market value" of twelve thousand and five hundred ($12,-
32 500.00) dollars, as returned by your petitioner, up to the sum of twenty-three thousand two hundred and fifty-six ($23,256.00) dollars, as the valuation of said land for the year 1920, which increased assessment was more than the "true market value" of said land.

8. That your petitioner was not given any notice, nor given any opportunity to appear before the said Board of Tax Assessors of said county, to object or protest against the increased assessment placed upon the aforesaid land of your petitioner before the increased assessment was made by said Tax Assessors of said County upon the property of your petitioners aforesaid.

9. That the action and conduct of the said County Tax Assessors in raising and increasing the valuation of Your Petitioner's land for taxation, was not done in obedience of any order or discretion of the State Tax Commissioner, but such action and doing of the said Tax Assessors in raising and increasing the assessment of the valuation of your petitioner's property as above set forth, was executed by said Tax Assessors in accordance and conformity and by virtue of the Georgia Tax Equalization Act (Laws of 1913, page 123, et seq. and as contained in Sections 116 (*g*), (*h*), (*i*), (*j*), (*k*), (*l*), (*m*), (*n*), (*o*) and (*p*), inclusive, of Park's Annotated Code of the State of Georgia.

10. That the said Georgia Tax Equalization Act above set forth is unconstitutional, in that, it fails to provide for a notice to Your petitioner, before the increased assessment was to be made and was in fact made, and because it fails to provide to your petitioner or for your petitioner a hearing before the said Tax Assessors, before the increased assessment is or was made upon the aforesaid property of Your petitioner, and which said Georgia Equalization Act is violative of the Fourteenth Amendment (14th) to the Constitution of the United States, which provides as follows, to-wit: "Nor shall
33 any State deprive any person of life, liberty, or property without due process of law."

11. That the increased assessment which was placed upon the property of Your petitioner as aforesaid, was illegal, in that it was confiscatory, because, said increased assessment was made by said Tax Assessors upon the property of your petitioner, when values were unreasonably inflated, and which said increased assessment was based upon such unreasonable inflated values, when in fact and truth such unreasonable inflated value was not the "true market value" of said property of your petitioner.

12. That sometime during the year 1920, the County Commissioner of Roads and Revenues of Warren County, Georgia, did assess and levy the rate of tax for said County of Warren as follows to-wit:

"16.00 per thousand on $3,476,074.00 will net $55,616.00."

That this the foregoing order of said county Commissioner levying the rate of tax for said County for the year 1920, was void, because:

(*a*) The said County Commissioner did not enter said order upon the minute book, because the said Commissioner did not keep any minute book of his acts and doings.

(*b*) Said order was void, because, it failed to specify the per cent levied for each specific purpose as enumerated in Section 513 of Park's Annotated Code of Georgia, as required by Section 514 of said Code of Georgia, which provides as follows, to-wit:

"As soon as the County Tax is assessed for the year it shall be done by order of said Ordinaries and entered on their minutes, which must specify the per cent levied for each specific purpose. The assessment applies to every species of value or specifies which is taxed by the State."

(*c*) That the above rate of tax assessed by said Commissioner for the year 1920, was more than fifty per cent of the State Tax for the year 1920, levied, and had not been recommended by the
34 Grand Jury of Warren County, Georgia, as required by law.

13. That an execution was issued by the Tax Collector of said county upon the 20th day of December, 1920, against your petitioner in the sum of eight hundred and thirty-eight and 03/100 dollars

($838.03), for the collection of the tax claimed to be due by your petitioner for the year 1920, and which execution is now in the hands — the Sheriff of said county, who is threatening to levy the same upon the property of your petitioner for the collection of said tax.

14. That the said Tax execution issued illegally against your petitioner for all of the reasons and facts above set forth.

15. That your petitioner is without an adequate remedy at law for the protection of his rights.

16. Petitioner files this his bill in equity to prevent a multiplicity of suits.

17. That your petitioner now tenders such legal amount to the Officials above set forth in payment of his taxes for the year 1920, which amount petitioner is unable to specify because the amount is not capable of being ascertained, but your petitioner refuses to pay the illegal amount demanded of him, to-wit: $838.03.

Wherefore, your petitioner prays:

(*a*) That the Sheriff of Warren County, to-wit: G. P. Hogan be enjoined and restrained from levying said tax execution upon any property of Your petitioner, or from proceeding any further with said tax execution, or doing anything in an effort to collect the same.

(*b*) That the said increased valuation and assessment above set forth, which was made and entered upon and against the property of your petitioner as above set forth by the Tax Assessors of said County be declared illegal, null and void for the reasons and facts above set forth.

(*c*) That the order passed by the Commissioner of Roads and Revenues of said County levying the tax rate for said County
35 for the year 1920, be declared illegal, null and void for the reasons and facts above set forth.

(*d*) That process may issue directed to the Sheriff of said County, to-wit: G. P. Hogan, to the Tax Collector of said County, J. T. Scruggs; to the Commissioner of Roads and Revenues of said County, to-wit: D. E. Johnson and to the Tax Assessors of said county to-wit: C. A. Wheeler, H. F. Norris and G. A. Ray, requiring them to be and appear at the next term of said Court to answer this Your petitioner's complaint.

L. D. McGREGOR,
Attorney for Petitioner.

GEORGIA,
Warren County:

Personally appeared before me an officer authorized by law to administer oaths, C. E. McGregor, who after being duly sworn deposes and says: that the facts stated and set forth in the foregoing petition

are true in so far as his own knowledge is concerned and he believes them to be true from the knowledge which he has acquired from others.

C. E. McGREGOR.

Sworn to and subscribed to before me this 15th day of April, 1921.
F. L. HOWELL,
N. P. & Ex. J. P.

36 Warren Superior Court, July Term, 1921.

C. E. McGregor

vs.

G. P. Hogan, Sheriff; D. E. Johnson, Commissioner; J. T. Scruggs, Tax Collector; C. A. Wheeler, H. F. Norris, and G. A. Ray, Tax Assessors for Warren County, Georgia.

Injunction.

Now comes C. E. McGregor, the plaintiff in the above stated case and amends his original petition in said case and for amendment says:

1. Plaintiff amends paragraph 10 of the petition by adding and inserting after the last word in the last line "law" in said paragraph the following allegation, to wit: And that the above set forth and described Georgia Tax Equalization Act is violative of Article 1, Section 1, paragraph 3, of the Constitution of the State of Georgia, which provides as follows: to wit: "No person shall be deprived of life, liberty, or property, except by due process of law."

2. Plaintiff amends paragraph 12 of the petition, by adding thereto sub-division or section (*d*) to read as follows:

(*d*) That the above and foregoing order of said County Commissioner levying the rate of tax for said county for the year 1920, was void, because, the same was not advertised before the Court house door for any length of time as required by law; neither was it published in any newspaper in Warren County, Georgia, during the year 1920, even though the Warrenton Clipper was published in said County during the entire year of 1920, and which paper carried all the legal advertisements for said County during the year 1920.

3. Plaintiff amends paragraph 17 of the petition by striking therefrom the following "is unable to specify because the amount is incapable of being ascertained" which appears between the word petitioner" in the third line thereof, and the word "but" in the fourth line thereof, and alleging in lieu thereof the following, to wit: allege as being due by him for taxes for the year 1920 upon all the property as returned by your petitioner for taxation is four hun-
37 dred and seven and 10/100 ($407.10) dollars at the rate of fourteen mills, including the State's tax of five mills, and

which amount we now tender in payment of my taxes for year 1920 as the County Commissioner had no legal authority to assess your petitioner more than 100 per cent of the State's tax to pay the accumulated debts and current expenses and 4/10 of one per cent to work the roads and build and repair bridges in and for said county during the year 1920.

4. Plaintiff amends his original petition by adding thereto paragraph 18 which shall read as follows:

18. That upon the 2nd day of May, 1905, the Board of Commissioners of Roads and Revenues in and for said County of Warren adopted what was known as the "Alternative Road Law," as contained in section 573 to section 583" of Georgia, and which law was existing and binding upon the County Commissioner of said county during the year 1920, and under which law the roads of said county were being established, operated and maintained and worked during the year 1920.

Wherefore, Plaintiff prays that these his grounds of amendment be allowed and ordered filed as a part and portion of the pleadings in said case.

L. D. McGREGOR,
Attorney for Plaintiff.

GEORGIA,
Warren County:

Personally appeared before me an officer duly authorized by law to administer oaths, C. E. McGregor, who after being duly sworn, deposes and says: That the facts stated and alleged in the above and foregoing amendment are true.

C. E. McGREGOR.

Sworn to and subscribed before me this the 31st day of May 1921.
A. J. ADKINS,
J. P.

38 The above and foregoing amendment allowed and ordered filed as a part of the pleadings in the above stated case. This the 31st day of May 1921.

E. T. SHURLEY,
Judge Superior Court, Toombs Circuit.

The above and foregoing petition having been read and considered, it is hereby ordered and adjudged by the Court that all of the Defendants named and set forth in the above and foregoing petition are enjoined and restrained as prayed in said petition, until the further order of this court.

It is further ordered that the defendants show cause before me upon the 23rd day of April, 1921, why the prayers of the above and foregoing petition should not be granted if any they can.

Ordered further that the defendants named in the above and

foregoing petition be served with a copy of this petition at least five days before the date of hearing, and that pltf. and deft. serve each other with copies of all documentary evidence to be used 3 days before the hearing. This Apr. 15, 1921.

E. T. SHURLEY,
J. S. C. T. C.

Filed in office this April 15, 1921.

A. E. MASSENGALE,
Clerk.

C. E. McGREGOR

vs.

D. E. JOHNSON, Commissioner, et al.

Complaint in Warren Superior Court.

And now comes G. P. Hogan, one of the defendants in the above stated case and for plea and answer says:

He admits paragraph- one, two, three, four and five of the petition.

Second. Paragraph- six to seventeen inclusive of the petition he is unable to admit or deny for want of sufficient information, except paragraph thirteen which is admitted.

39 Third. Defendant having fully answered asks to be hence discharged.

E. P. & J. CECIL DAVIS,
Attorneys for Defendant.

GEORGIA,
Warren County:

Personally appeared before the undersigned G. P. Hogan, who on oath states that the facts stated in the foregoing answer are true.

G. P. HOGAN,
Sheriff.

Sworn to and subscribed to before me this the 20th day of May, 1921.

J. CECIL DAVIS,
N. P., Warren Co., Ga.

Filed in office May 31, 1921.

A. E. MASSENGALE,
Clerk.

July Term, 1921.

C. E. McGregor

vs.

D. E. Johnson, Com., et al.

Complaint in Warren Superior Court.

And now comes C. A. Wheeler, H. F. Norris and G. A. Ray, defendants in the above stated case, and for answer thereto says:

First. They admit the allegations in paragraph- one, two, three, four and five of the petition.

Second. They admit paragraph six of the petition.

Third. They admit paragraph seven of the petition, except the allegations as to the "Market value" of the land.

Fourth. They admit paragraph eight of the petition.

Fifth. They deny paragraph nine of the petition.

Sixth. All the other paragraphs in the petition they are unable to admit or deny because of a want of sufficient information.

Seventh. Defendants further says that after they had raised petitioner's taxes they made a note of the same and attaching it to his returns served him with notice thereof according to law.

Defendants having fully answered asks to be hence discharged.

E. P. & J. CECIL DAVIS,
Attorneys for Defendants.

Georgia,
Warren County:

Personally comes C. A. Wheeler who on oath says the facts stated in the foregoing answer are true.

C. A. WHEELER.

Sworn to and subscribed before me this May 19th, 1921.

J. CECIL DAVIS,
N. P., Warren Co., Ga.

Filed in office May 31, 1921.

A. E. MASSENGALE,
Clerk.

July Term, 1921.

GEORGIA, WARREN COUNTY,

VS.

D. E. JOHNSON, Commissioner, et al.

Injunction in Warren Superior Court.

And now comes John T. Scruggs, one of the defendants in the above stated case and for plea and answer in said case, says:

1st. He admits paragraph- one, two, three, four and five of the petition.

2nd. Paragraph- six to seventeen, inclusive, of the petition he is unable to admit or deny for want of sufficient information.

Defendant having fully answered asks to be hence discharged.
E. P. & J. CECIL DAVIS.

41 GEORGIA,
Warren County:

Personally before the undersigned appeared John T. Scruggs who on oath says that the statements in the foregoing answer are true.
JOHN T. SCRUGGS.

Sworn to and subscribed before me, this the 31st day of May, 1921.

J. CECIL DAVIS,
N. P., Warren Co., Ga.

Filed in office this May 31, 1921.

A. E. MASSENGALE,
Clerk.

July Term, 1921.

C. E. MCGREGOR

VS.

D. E. JOHNSON.

Complaint in Warren Superior Court.

And now comes D. E. Johnson one of the defendants in the above stated case and for answer in said case says:

First. He admits paragraph- one, two, three, four and five of the petition.

Second. Defendant admits paragraph six of the petition except as to the allegation that the return of the 2,907 acres of land described

therein for $12,500 was at its true market value, which for want of information defendant can neither admit -or deny.

Third. Defendant admits the allegation in paragraph seven of the petition that the County tax assessors did without notice to the petitioner, and without his previous knowledge, increase the valuation upon said 2,907 acres of land to $23,256, but defendant denies that this was more than the true market value of land at the time. Defendant further says that the County Tax Assessors did within the time required by law after they had raised the tax of petitioner make a note of the same and attached it to petitioner's return and immediately notify him personally of the change and increase in his returns.

42 Defendant admits the allegations in paragraph eight, but defendant says that the petitioner was notified by the Assessors of the raise in his returns, after the same was made, and that this notice complied fully with the statute in such cases, and eas all that the law requires.

Fifth. Answering paragraph nine defendant admits that the State Tax Commissioner did not order any per centum increase in the tax returns of said Warren County, but he did order the County tax assessors to increase the tax returns of such individual citizens of the county as, in their judgment, were too low.

Defendant denies the allegations in paragraph ten of the petition and says that the Georgia Tax Equalization Act is not unconstitutional for the reasons alleged in said paragraph, nor is it violative of the 14th Amendment of the Constitution of the United States.

Seventh. Defendant denies the allegations in paragraph eleven of the petition.

Eighth. Defendant admits that the tax levy of the Commissioner of Warren County, Georgia, set out in paragraph twelve of the petition is defective but defendant asks the Court to permit him to amend such tax levy of 1920 so as to perfect it and make it legal, said amendment to be in substance as set out in Exhibit "A," attached thereto, which, if defendant should do, he asks the Court to deny the injunction prayed for.

Defendant denies the allegations in paragraph fourteen of the petition. He also denies the allegations in paragraph- fifteen, sixteen and seventeen of the petition.

Defendant further says (that after the Act of September the 19th, 1908, providing for the employment of felony and misdemeanor convicts upon the public roads of the several Counties of the State etc., Warren County, through its Board of Commissioners applied to the Prison Commisson of the State of Georgia for its

43 quota of male felony convicts and that said convicts were apportioned by the said Prison Commission of Georgia to Warren County if not its full quota at least a large number of them. That while the Grand Jury of Warren County had several years prior to 1908 recommended that the Alternative Road Law

be put in operation in Warren County, after the Act of September the 19th, 1908 went into effect and Warren County received and continued to receive its quota of convicts, little, if any, attention was paid to the Alternative Road Law and certainly no tax was ever levied by the Commissioners as authorized by Section 696 of the Code, for the purpose of working the roads of Warren County under said Alternative Road Law nor was such a tax levied in 1920, but the Commissioner worked the roads entirely by convict labor, the County's quota of felony convicts received from the Prison Commission, and of misdemeanor convicts. Defendant further says that on August 18th, 1919, Acts 1919, page 773 the Board of Commissioners of Warren County was abolished and an Act was passed creating a Commissioner of Roads and Revenues of Warren County, etc., (Acts of 1918, page 773). That section 9 of said Act of August the 18th, 1919, Acts 1919, page 776, provides:

"That the Commissioner of Roads and Revenues of Warren County shall have authority to equip and maintain a chain gang in and for said County of Warren according to the law of said State for the purpose of working on and building roads and bridges for said County."

That section 5 of said Act authorized the County to pay to said Commissioner a salary of twelve hundred dollars per annum and actual expenses in maintenance and travel when away from home on the business of his office. That Section 6 of said Act provides for a Secretary for said Commissioner of Roads and Revenues of Warren County at a salary of four hundred dollars per year. That Section twelve of said Act authorized the Commissioner of
44 Roads and Revenues of Warren County to elect a Superintendent of Roads and Bridges for said County, said Superintendent to be a regular Civil Engineer or a man with experience in road building, at a salary not to exceed eighteen hundred dollars, and that under said Act said Commissioner of Roads and Revenues of Warren County, Georgia, was to have full authority over all road matters, etc.

That immediately on going into office this Commissioner of Roads and Revenues of Warren County, Georgia, realizing the necessity of and the advisability of proper machinery to work said roads, somewhat enlarged the chain-gang and increased its efficiency, which was attended with considerable expense.

Deponent further says that the Act reorganizing the State Highway Department approved August the 18th, 1919, provided for the co-operation of the County Commissioners with the State Highway Department of Georgia in the building of roads. Section 6 of said State Highway Act required the Counties to furnish free to the State Highway Road all necessary rights of ways for the designated roads in each county constituting any portion of the system of State Aid Roads. That the State Highway Board was contemplating, locating, building, and had surveyed or was surveying in January, 1920, four number of roads radiating from the City of Warrenton to the adjoining county limits and that these surveys were not fol-

lowing the old roads already located but were running through many plantations which would necessitate the purchase of many right of ways. Defendant says that the Legislature of Georgia never contemplated that the expense of working the public roads with convicts apportioned under the Act of 1908 to the various counties, and the expenses incurred or authorized under the Act of August the 18th, 1919, creating a Commissioner of Roads and Revenues for Warren County, Georgia, and providing for the organization
45 and maintenance of a chain gang in Warren County, and the expense of purchasing the right of ways for the State aid roads, authorized and required under Section Six of the State Highway Act., should come within the four mills which the Counties were authorized to levy for road purposes under Section 696 of the Code and which refers to Counties working its roads under the Alternative Road Law. On the contrary, defendant says that these several acts, the Act of September the 18th, 1908, the Act of August the 18th, 1919, and the Act reorganizing the State Highway Department, approved August the 18th, 1919, all providing certain work to be done by the County of Warren and certain expenses to be incurred, carried with them the necessary authority of the County authorities to levy and collect such taxes as might be necessary to put the provisions of said Acts into effect.

Defendant further says that the Commissioner of Roads and Revenues for Warren County, Georgia, did actually spend upon the public roads of Warren County, Georgia, and in maintaining and equipping the chain gang which worked the public roads of Warren County during the year 1920, the sum of forty two thousand seven hundred fifty three and 37/100 dollars, and that this sum was disbursed by said Commissioner for machinery, clothing, food, beds, medical treatment, salaries, right of ways and other legal expenses, including past dues outstanding legal warrants on the county, provided for in said Acts, and all of which was a legitimate expense on the part of the Commissioner for County purposes.

Deponent further says that the amount above specified was legitimately spent for County purposes by defendant's predecessor, and that the County got the benefit of money actually spent, and, as no debt was created by the County, the tax levy as made by said Commissioner in 1920, as it is proposed to be amended herein, should stand.

Wherefore defendant having fully answered asks that the injunction prayed for be denied and that the restraining or-
46 der heretofore granted be revoked.

E. P. & J. CECIL DAVIS,
Attorneys for Defendant.

GEORGIA,
Warren County:

Personally comes D. E. Johnson and C. R. Fitzpatrick, who on oath says that the facts stated in the foregoing answer, so far as they come within *his* knowledge are true, and so far as *he* derives them from the knowledge of others *he* believes them to be true.

C. R. FITZPATRICK.

Sworn to and subscribed before me, this the 31 day of May 1921.

J. CECIL DAVIS,
N. P., Warren County, Ga.

"EXHIBIT."

Commissioner's Office, Warren County, Georgia.

Whereas the Commissioner of Roads and Revenues for 1920 made the following tax levy for the year 1920:

"Sixteen dollars on the thousand on $3,476,074.00 will net fifty-five thousand six hundred and sixteen dollars," and,

Whereas said tax levy does not conform to Section 513 and Section 514 of Parks Annotated Code of Georgia, and,

Whereas the taxable property of the County of Warren for the year 1920, as shown by the tax digest is three million dollars, and,

Whereas it is now desired to amend said tax levy and make it conform to said Section of the Code, and the other laws of this state in regard thereto, and,

Whereas there was actually spent for all county purposes by the Commissioner of Roads and Revenues of Warren County, Georgia, for the year 1920 the gross sum of sixty three thousand three
47 hundred and ten dollars and seven cents, and,

Whereas, the amount so actually spent by the Commissioner of Roads and Revenues of Warren County for the year 1920 for various County purposes are ascertained and set out in the amendment hereto made:

Be it therefore, resolved that said levy of taxes for the year 1920, above quoted, be and the same is hereby amended and placed upon the minutes of the Commissioner of Roads and Revenues of Warren County, Georgia as follows:

By virtue of the authority vested in the Commissioner of Roads and Revenues of Warren County, Georgia, the following assessments upon *yhr* State tax for the year 1920 are levied against all taxable property in Warren County, Georgia, subject to taxation within said County for the year 1920, the same, except the tax for road purposes, support of the chain gang, building and repairing jail and court house, and support of paupers, being less than fifty per cent of the State's tax for said County, to-wit:

To pay all legal indebtedness of the county due, or to become due during the year, or past due:—9/200%.

To build or repair court houses or jails, bridges, or ferries, or other public improvements according to contract:—11.565%.

To pay sheriff's, jailor's or other officers' fees that may be legally entitled to out of the County:—11.50%.

To pay all coroners all fees that may be due them by the County for holding inquests:—0/00%.

To pay the expenses of the County for bailiffs at Court, non-resident witnesses in criminal cases, fuel, servant hire, stationary and the like:—17.95%.

To pay jurors a per diem compensation:—11.304%.

To pay expenses incurred in supporting the poor of the County, and as otherwise prescribed by this Code:—12.50%.

To pay charges for educational purposes to be levied
48 only in strict compliance with the law: 0.00%.

To pay any other lawful charge against the County 0.00%, and,

Whereas, after the Act of September the 19th, 1908 providing for the apportionment between the various counties of the state, the Commissioners of Warren County applied to the Prison Commission for and received its quota of the convicts of said State, and that since which time Warren County has maintained a large and efficient chain-gang with substantial and ample quarters, and that the County of Warren, in equipping said chain gang has purchased considerable machinery, and,

Whereas, in the abolishment of the Board of Commissioners of Roads and Revenues of Warren County, Georgia, by the Acts of the — day of August, 1919, and the creation of the Commissioner of Roads and Revenues of Warren County, Georgia, by the Act of the — day of ——, the chain gang was increased and other needful machinery was purchased, and,

Whereas, the Act creating the Commissioner of Roads and Revenues for Warren County, Georgia, on the — day of ——, 1919, provided for a salary of twelve hundred dolars to the Commissioner, and four hundred dollars to the Secretary to the Commissioner, and eighteen hundred dollars to a Superintendent of Roads who should be an engineer, and,

Whereas, under the Acts reorganizing the State Highway Department, approved August the 18th, 1919, Acts 1919, page 242, the counties of the State were to co-operate with the State Highway Department of Georgia in building the State Aid Roads, and each county was to furnish the right-of-way for such State Aid Roads, and,

Whereas, The State Highway Department of Georgia contemplated
four State Aid Roads radiating from Warrenton, Georgia, to
49 the county line limits of the adjoining counties, necessitating the acquirement of many right of ways, and,

Whereas, Warren County did not for the year 1920 levy the four mills authorized in the Code for the purpose of working the roads under the alternatice road law, and,

Whereas, there was actually spent for road purposes during the year 1920, the sum of forty two thousand seven hundred and fifty three dollars and thirty two cents, and for which the County got the benefit, and,

Whereas no debt was created, the following tax is levied upon the taxable property of Warren County, Georgia, for the year 1920, for the support of the chain gang, for machinery for road building, and for purchasing right-of-ways in co-operation with the State Highway Department, to-wit: 245.915%, to net $42,753.32.

Ordered further that this order be advertised and posted in accordance with Section 515 of the Code of Georgia, and a copy thereof be furnished the Tax Collector of Warren County, Georgia.

Filed in office this May 31, 1921.

A. E. MASSENGALE,
Clerk.

July Term, 1921.

C. E. McGregor

vs.

D. E. Johnson, Commissioner, et al.

Injunction in Warren Superior Court.

And now comes D. E. Johnson, Commissioner, one of the defendants in the above stated case, and in answer to the amendment of plaintiff's petition in the above stated case, *and* says:

1st. Defendant denies the allegations in paragraph one of the amendment.

2nd. For a want of sufficient information defendant is unable to deny the allegations in paragraph two of the amendment.

50 3rd. Defendant denies the allegations in paragraph three of plaintiff's amendment.

4th. For a want of sufficient information defendant is unable to admit o. deny that on the 2nd day of May 1905, the Board of Commissioners of Roads and Revenues for Warren County adopted what is known as the Alternative Road Law but defendant does deny the County Commissioner during the year 1920 operated, worked, established and maintained the roads of said county under the Alternative Road Law.

Defendant having fully answered asks that the injunction be denied and that the restraining order heretofore granted be revoked.

E. P. & J. CECIL DAVIS,
Attorneys for Defendant.

Georgia,
Warren County:

Personally appeared before the undersigned D. E. Johnson who on oath says that the statements contained in the foregoing answer are true.

D. E. JOHNSON.

Sworn to and subscribed to before me, this the 31 day of May, 1921.

A. E. MASSENGALE,
C. S. C. Warren Co., Ga.

The above and foregoing amendment allowed and ordered filed and made a part of the record.
This the 31st day of May, 1921. E. T. SHURLEY,
Judge Sup. Court, Toombs Circuit.

Filed in office this May 31, 1921.
A. E. MASSENGALE,
Clerk.

51 July Term, 1921.

C. E. McGREGOR

vs.

D. E. JOHNSON, Commissioner, et al.

Petition for Injunction in Warren Superior Court.

The above stated petition for injunction having come on to be heard by consent of all parties on the — day of May 1921, defendants presented their answers and proof was submitted by both plaintiff and defendants, D. E. Johnson, Commissioner, the same was argued by counsel for both parties, my decision or judgment was reserved until this day:

Now after considering both the petition and answers in said case and the evidence submitted by the plaintiff and defendants, it is considered, ordered and adjudged:

1st. That the injunction prayed for in said petition on the constitutional grounds therein alleged and all other grounds, except as against the tax levy for 1920, and the tax fi. fa. issued thereon against plaintiff, is hereby denied.

2nd. The injunction as prayed for as against the tax levy of the Commissioner of Warren County for the year 1920 is hereby granted, and the Court being of the opinion that the tax fi. fa. in the hands of G. P. Hogan, Sheriff of said County, sought to be enjoined, having been issued when there was no legal tax levy for the County for the year 1920, the said G. P. Hogan, Sheriff of said County, should also be enjoined from proceeding to levy, or collecting said tax fi fa; it is therefore ordered, considered, and adjudged that the said D. E. Johnson Commissioner, and the said G. P. Hogan, Sheriff, be and they are hereby enjoined from collecting said tax fi fa now in the hands of G. P. Hogan, Sheriff, and which is sought to be enjoined by the petitioner.

3rd. It is further ordered that D. E. Johnson, Commissioner, be permitted, and he is hereby permitted and ordered, to amend the tax levy for the year 1920 in the manner he prays to do in his answer, and in accordance with his proposed amendment set out and attached to his answer, and that said tax levy as amended
52 be by him placed on the minutes of the Commissioner of Warren County, Georgia, and published as provided by law.

4th. It is further ordered, that after the said D. E. Johnson, Commissioner, has amended the tax levy for the year 1920 in accordance with his prayer, as set out in his answer, that the Tax Collector of Warren County, John T. Scruggs, issue a new fi fa based on said levy as amended.

When the said D. E. Johnson, Commissioner, has amended the tax levy for the year 1920 in accordance with his prayer as set out in his answer, and in accordance with the proposed amendment of said tax levy, attached to his answer, and the same is placed on the minutes of said Commissioner, and the Tax Collector, John T. Scruggs, has issued a new fi. fa. based on said tax levy as amended, as herein ordered, then the said commissioner and Sheriff, are hereby authorized to proceed to collect said taxes due for the year 1920 under and by virtue of the new tax fi fa unrestrained and unhampered by the injunction this day granted restraining and enjoining the collection of the taxes due by plaintiff under and by virtue of the fi. fa. issued on the — day of ——, 1921, under the original tax levy for Warren County, Georgia for the year 1921, it being the intention of this order to restrain said Commissioner and Sheriff from further proceding under the fi. fa. now issued.

This the 28th day of June 1921.

E. T. SHURLEY,
J. S. C. T. C.

53 Clerk's Office, Superior Court of Warren County, Ga.

Warrenton, Ga., July 23, 1921.

I hereby certify, That the foregoing pages, hereto attached, contain a true transcript of such parts of the record as are specified in the bill of exceptions and required by the order of the Presiding Judge, to be sent to the Supreme Court in the case of C. E. McGregor, Plaintiff in error, vs. The Sheriff of Warren Co. G. P. Hogan, et al., Defendant in error.

I further certify, That the Term of said Court, at which said case was tried, adjourned —— —, 19—. All of which appears from the Records and Minutes of said Court. Witness my signature and the seal of said Court, affixed the day and year first above written.

[SEAL.] A. E. MASSENGALE,
Clerk Superior Court, Warren County, Ga.

(Endorsed:) Case No. 2743. Supreme Court of Georgia, October Term, 1921. McGregor, Pl'ff in Error, vs. Hogan, sheriff, et al., Def't- in Error. Transcript of Record. Filed in office this 25th day of July, 1921. W. E. Talley, D. Clerk Supreme Court.

54 No. 2743.

McGregor

v.

Hogan, Sheriff, et al.

Opinion and Judgment of the Supreme Court of Georgia.

55 Supreme Court.

No. 2743.

McGregor

v.

Hogan, Sheriff, et al.

By the Court:

1. Section 6 of the act of 1913 (Acts 1913, p. 123) known as the tax-equalization act, provides that where, in the opinion of the board of county tax assessors, any taxpayer has omitted from his returns any property that should be returned, or has failed to return any of his property at a just and fair valuation, the board shall correct said returns and shall assess and fix the just and fair valuation to be placed on the property and shall make a note thereof and attach the same to the returns. It is also the duty of the board, when any corrections, changes, and equalizations shall be made by the board, to immediately give notice to any taxpayer of any changes made in his returns in the manner specified in the act; and if the taxpayer is dissatisfied with the action of the board, he may, within ten days from the giving of the notice, in case of residence, and within twenty days in case of non-residence in the county, give notice to the board that he demands an arbitration, giving at the same time the name of his arbitrator; the board shall name its arbitrator within three days thereafter; and these two shall select a third, a majority of whom shall fix the assessment on the property on which the taxpayer shall be taxed, and the decision of the arbitrator shall be final, etc. Held, that the provision in section 6 of the act of 1913, providing for notice to the taxpayer and his right to arbitration, affords him due process of law, and this section of the act in and of itself is not violative of the due-process clauses of the State and Federal constitutions.

56 (*a*) A taxpayer whose property has been given in by himself for taxation, which has been raised in amount by the tax-assessors of the county, who notify the taxpayer as required by the act, and who fails to ask for an arbitration as therein provided, is not deprived of due process of law under the State and Federal constitutions.

(*b*) In a case where the taxpayer has asked for arbitration, and arbitrators have been appointed and they fail to agree on an award within the ten days provided by the statute, the question as to whether such effort at arbitration would deny the taxpayer due process of law is not raised under the facts of this case.

2. Under art. 7, sec. 6, par. 2, of the constitution of the State, the objects for which taxation may be levied by a county are enumerated, but there is no limitation in the constitution upon the taxing power of a county in regard to the amounts to be levied for these authorized purposes; the amount to be levied for each purpose is under legislative control.

3. Under §§ 514 and 515 of the Civil Code of 1910, the ordinaries, or other county authorities having the duty of assessing the county tax for each year are directed to levy and assess such taxes by order and enter the same on their minutes, which must specify the per cent. levied for each specific purpose, and to advertise immediately a copy of such order for thirty days at the door of the court-house and in a public gazette. Such provision with reference to advertising the copy of the order is directory and not mandatory, and a failure to comply with such provision will not render the tax levy and assessment void.

57 C. E. McGregor, for himself and on behalf of such other taxpayers of Warren County as were similarly situated, filed an equitable petition against C. P. Hogan, the sheriff of Warren County, J. T. Scruggs, the tax-collector of Warren County, D. E. Johnson, the sole commissioner of roads and revenues of Warren County, and C. A. Wheeler, H. F. Norris, and S. A. Ray, composing the county board of tax-assessors of Warren County, praying that the sheriff of Warren County be enjoined from levying a certain tax execution issued against him upon any of his property, and from proceeding further with the tax execution in an effort to collect the same; and that the assessment made by the tax-assessors of Warren County be declared null and void, etc. From the record it appears that C. E. McGregor returned for taxation for the year 1920, in Warren County, 2,907 acres of land at a valuation of $12,500. The Board of tax-assessors of that county, without giving the plaintiff any previous notice, raised the valuation of the 2,907 acres of land to the sum of $23,560; and it was alleged that the increased assessment was more than the true market value of the land. Plaintiff was not given any notice or opportunity to appear before the board of tax-assessors to object to or protest against the increased assessment before it was made. It was also alleged, that the action of the board of tax-assessors was not done in obedience to any order of the State tax commissioner, but was executed by the tax-assessors in conformity and by virtue of the Georgia tax-equalization act (Laws of 1913, p. 123 et seq., and as contained in §§ 116, (*g*), (*h*), (*i*), (*j*), (*k*), (*l*), (*m*), (*n*), (*o*), (*p*), inclusive of Park's Annotated Code of Georgia); that the Georgia tax-equalization act, as contained in section 6 thereof, is unconstitutional in that it fails to provide for a notice and

hearing before the tax-assessors and before the increased assessment is made upon the property of plaintiff, and is violative of the
58 due-process clauses of both the State and Federal constitutions; that the increased assessment placed upon plaintiff's property was illegal in that it was confiscatory; and that some time during the year 1920 the commissioner of roads and revenues of Warren County did assess and levy the rate of taxes for the year 1920, as follows: "$16.00 per $1,000 on $3,476,074, which will net $55,616." It was alleged that such levy was void: (*a*) Because the county commissioner did not enter the same upon the minute-book, and because the commissioner did not keep any minute-book of his acts and doings. (*b*) Because it failed to specify the per cent. levied for each specific purpose as enumerated under § 513 of Park's Annotated Code of Georgia, as required by § 514 of the Code of 1910, which provides as follows: "As soon as the county tax is assessed for the year, it shall be done by order of said ordinaries and entered on their minutes, which must specify the per cent. levied for each specific purpose. The assessment applies to every species of value or specifies which is taxed by the State." (*c*) Because the rate the commissioner attempted to assess for the year 1920 was more than 100 per cent. of the State tax of 5 mills, and .4 of one per cent. to work the roads and repair the bridges in the county for the year 1920. (*d*) Because the tax levy was not advertised before the court-house door for any length of time, nor was it published in any newspaper, as required by law. (*e*) Because the County of Warren had adopted the alternative road law as contained in §§ 694-704 of the Code of 1910, and the same had not been repealed or abolished; which law was binding upon the county commissioner during the year 1920, and under which law the public roads of Warren County were established, worked, and maintained during the year 1920.

All of the defendants filed answers, admitting certain paragraphs of the petition and denying others; but the defendant D. E.
59 Johnson, who was the sole county commissioner, and averred specially as follows: As to the allegation that the return of the 2,907 acres of land for $12,500 was at its true market value, for want of information he could neither admit nor deny. He admitted the allegation in paragraph 7, that the county tax-assessors did, without notice to the plaintiff and without his previous knowledge, increase th evaluation upon the 2,907 acres of land to $23,256, but denied that this was more than the true market value of the land. Answering further he says that the county tax assessors did, within the time required by law, after they had raised the tax assessment, make a note of the same and attached it to plaintiff's return, and immediately notified him personally of the change and increase in his return. He admits the allegations in paragraph 8 of the petition, but averred that the plaintiff was notified by the assessors of the raise in his return after the same was made, and that this notice complied fully with the statute in such cases. Answering paragraph 9, defendant averred that the State tax commissioner did not order any per centum increase in the tax returns of Warren County, but did order the county tax assessors to increase the tax returns of such in-

dividual citizens of the county as in their judgment were too low. He denied the allegation in paragraph 10, and averred that the Georgia tax-equalization act is not unconstitutional for the reasons alleged in that paragraph, nor is it violative of the fourteenth amendment of the constitution of the United States. It was admitted in this defendant's answer that the tax levy of he commissioner of Warren County, set out in paragraph 12 of the petition, is defective; but defendant prayed the court to permit him to amend such tax levy of 1920 so as to perfect and make it legal, the amendment to be in substance as set out in an exhibit attached to the answer. He also averred, that "after the act of September 19, 1908, providing for the employment of felony and misdemeanor convicts upon the public roads of the several counties of the State, etc., Warren County, through its board of commissioners applied to the Prison Commission of the State of Georgia for its quota of male felony convicts; and that said convicts were apportioned by the Prison Commission of Georgia to Warren County, it not its full quota, at least a large number of them; that while the grand jury of Warren County had, several years prior to 1908, recommended that the alternative road law be put into operation in Warren County, after the act of September 19, 1908, went into effect and Warren County received and continued to receive its quota of convicts, little, if any, attention was paid to the alternative road law, and certainly no tax was ever levied by the commissioners as authorized by section 696 of the Civil Code for the purpose of working the roads of Warren County under the alternative road law, nor was such a tax levied in 1920, but the commissioner worked the roads entirely by convict labor, the county's quota of felony convicts received from the Prison Commission, and misdemeanor convicts; that on August 18, 1919, page 773 the board of commissioners of Warren County was abolished, and an act was passed creating a commissioner of roads and revenues of Warren County (Acts 1919, p. 773); that section 9 of said act provides: "That the commissioner of roads and revenues of Warren County shall have authority to equip and maintain a chaingang in and for said County of Warren, according to the law of said State, for the purpose of working on and building roads and bridges for said County."

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The case was submitted to the court, after evidence introduced by the plaintiff in support of the allegations of his petition and amendment thereto, and the defendants introduced evidence tending to support their answers and amendment; and after argument the presiding judge rendered the following judgment; 1st. That the injunction prayed for in said petition, on the constitutional grounds therein alleged and all other grounds, except as against the tax levy for 1920, and the tax fi. fa. issued thereon against the plaintiff, is hereby denied. 2nd. The injunction as prayed against the tax levy of the commissioner of Warren County for the year 1920 is hereby granted; and the court being of the opinion that the tax fi. fa. in the hands of G. P. Hogan, sheriff of said county, sought to be enjoined, having been issued when there

61

was no legal tax levy for the county for the year 1920, the said G. P. Hogan, sheriff of said county, should also be enjoined from proceeding to levy or collecting said tax fi. fa. It is further ordered, considered, and adjudged that the said D. E. Johnson, commissioner, and the said G. P. Hogan, sheriff, be and they are hereby enjoined from collecting said tax fi. fa. now in the hands of G. P. Hogan, sheriff, and which is sought to be enjoined by petitioner. 3rd. It is further ordered that D. E. Johnson, commissioner, be permitted, and he is hereby permitted and ordered, to amend the tax levy for the year 1920, in the manner he prays to do in his answer and in accordance with the proposed amendment set out and attached to his answer, and that said tax levy as amended be by him placed on the minutes of the commissioner of Warren County, Georgia, and published as provided by law. 4th. It is further ordered that after the said D. E. Johnson, commissioner, has amended the tax levy for the year 1920, in accordance with his prayer as set out in his answer, that the tax-collector of Warren County, John T. Scruggs, issue a new fi. fa. based on said levy as amended. When the said D. E. Johnson, commissioner, has amended the tax levy for the year 1920, in accordance with his prayer as set out in his answer, and in accordance with the proposed amendment of said tax levy attached to his answer, and the same is placed in the minutes of said commissioner, and the tax-collector, John T. Scruggs, has issued a new fi. fa. based on the said tax levy as amended, as herein ordered, then the said commissioner and sheriff are hereby authorized to proceed and collect said taxes due for the year 1920, under
62 and by virtue of the new tax fi. fa., unrestrained and unhampered by the injunction this day granted, restraining and enjoining the collection of the taxes due by plaintiff under and by virtue of the fi. fa. issued on the — day of ——, 1921, under the original tax levy for Warren County, Georgia, for the year 1921; it being the intention of this order to restrain said commissioner and sheriff from further proceeding under the fi. fa. now issued." To this order, the plaintiff excepted.

HILL, *J.* (after stating the foregoing facts):

1. The first ground of exception to the opinion holding in effect that section 6 of the tax-equalization act of the State of Georgia (Acts 1913, p. 123, et seq.) is not unconstitutional and void as offending both the State and Federal constitutions, which provide for due process of law, is that section 6 of the act does not provide for any notice to the taxpayer before the assessment is made by the tax-assessors and that opportunity is not given to the taxpayer to be heard as of right before the assessment becomes final against him. It is insisted that as applied to the facts of this case the plaintiff is denied due process of law as guaranteed to him by the fourteenth amendment of the constitution of the United States, and by art. 1, sec. 1, par. 3, of the constitution of the State of Georgia. Paragraph 6 of the act of 1913 has been declared constitutional by this court several times. The first case in which it was held not to be obnoxious

to the due-process clauses of the State and United States constitutions was Vestel v. Edwards, 143 Ga. 368. In that case it was held: "An act of the Legislature, which has for its object the equalization of taxation by means of a just and fair assessment of property
63 returned for taxation, and which provides for notice to any taxpayer whose returns have been increased, and that if he is dissatisfied with the action of the county board of tax-assessors in assessing the value of his property for taxation he may demand an arbitration of the question of the valuation of the property returned for taxation, and which provides that in case of disagreement as to the selection of an umpire the ordinary or the county commissioners, as the case may be, shall appoint one, and the arbitrators shall render their decision within ten days from the date of the naming of the arbitrator by the board, is not repugnant to the due-process clause of the constitution of the United States, as contained in the fourteenth amendment. (*a*) Nor is it obnoxious to the due-process clause of the constitution of the State of Georgia. (*b*) Nor does it deprive the tax payer of the equal protection of the laws." In the body of the opinion it was said: "It has been held that in the matter of taxation due process of law does not require a judicial procedure. And this ruling of the courts was both before and since the adoption of the fourteenth amendment to the constitution of the United States. Judson on Taxation [1st ed.], § 318, [2nd ed. § 3407]. And this ruling is based on the ground that revenues must be collected without delay, and can not await the decision of a common-law trial. Of necessity the sovereign must proceed in a somewhat summary way to collect taxes. Ibid. And while notice can not be dispensed with in cases where the tax is dependent on valuation of the property, and is not specific, the legislature may prescribe the kind of notice and the manner in which it shall be given. Judson on Taxation, § 321. See Turpin v. Lemon, 187 U. S. 51 (23 Sup. Ct. 20, 47 L. ed. 70). In Pittsburg &c. Ry. Co. v. Backus, 154 U. S. 421 (14 Sup. Ct. 1114, 38 L. ed. 1031), it was held: 'A tax law which grants to the taxpayer a right to be heard on the
64 assessment of his property before final judgment provides a due process of law for determining the valuation, although it makes no provision for a rehearing.' In McGehee on Due Process of Law, 239, it is said: 'Since proceedings for the assessment and collection of taxes were in constant use long before the adoption of the constitution, and have been necessarily employed by the Federal government and the various States ever since their formation, the rule that whatever proceedings are in accord with settled usage in England and in this country constitute due process is peculiarly applicable to test the sufficiency of notice and hearing required in such cases. In conformity with this principle, it has been held that the process of taxation 'involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them.' In Gray on Limitations on the Taxing Power, 577, § 1161, it is said: 'Where, before the assessment becomes final, opportunity is given to appear and make proofs before a board of commissioners, or a

board of equalization, having authority to hear complaints and proofs and make correction of the assessment, the opportunity is sufficient.' From these authorities, we think that it can not be said that the 6th section of the act in question deprives the plaintiff of due process of law, required by the State and Federal constitutions; nor do they deprive any taxpayer of the equal protection of the laws. Moreover, the 6th section of the act of 1913 provides that arbitration shall be had 'in the same manner as is now provided for the arbitration of individual tax returns, except in so far as the existing law may be modified by the provisions of this section.' The existing law on this question is contained in the Civil Code, § 1097 et seq., and in the Acts of 1910, p. 24. The code sections cited do not
65 provide for the selection of a third assessor, or umpire, except as he may be selected by the two assessors appointed by the tax-receiver and the taxpayer. But the act of 1910 (Acts 1910, p. 24) provides that the tax-receiver may make the assessment if the return of the taxpayer is not satisfactory to him, and the taxpayer, on notice to him within twenty days after receiving such notice, may refer the question of true value to arbitrators, 'one to be chosen by himself and one to be chosen by the tax-receiver, with power to choose an umpire in case of disagreement, and their award shall be final. * * * Should the two arbitrators provided for in this section fail to agree upon the value of the property, and fail to name an umpire within twenty days after their appointment, the umpire shall be named by the ordinary or the county board of commissioners, as the case may be.' Construing this act in conjunction with the code section cited above, it can not be held that the law does not provide for a case where the arbitrators fail to agree, and one or both arbitrarily or capriciously refuse to agree on an umpire. The act of 1910 as 'modified by the provisions of' the act of 1913 (Acts 1913, p. 128) provides that in case of disagreement of the arbitrarors the ordinary shall appoint the umpire. The disagreement, if any, will at once manifest itself, when application can be made to the ordinary for the appointment of an umpire, who can immediately proceed with his duties. There need be no unnecessary delay in the appointment of an umpire, or in the arbitration proceedings. So that, if the parties avail themselves of it, there is a remedy provided by law whereby the ordinary or county commissioners, as the case may be, can appoint an umpire in case of disagreement of the assessors, and the hearing can proceed without delay." And see to the same effect, Wade v. Turner, 146 Ga. 600; s. c. 147 Ga. 666; Barnes v. Watson, 148 Ga. 822.

66 The plaintiff cites the case of Turner v. Wade, 254 U. S. 64, as authority for holding that section 6 of the Georgia tax-equalization act of 1913 (Acts 1913, p. 123) is unconstitutional because it denies the complaining taxpayer due process of law; and because, as argued, the tax assessors were not required to give any notice to the taxpayer of an opportunity to be heard, as a matter of right, before the assessment was made against him. We do not understand that the decision of the United States Supreme Court goes to the extent insisted upon by the plaintiff in error. See, in

this connection, Ogletree v. Woodward, 150 Ga. 691, 697. The headnote in the Turner case, supra, is as follows: "The Georgia tax equalization act (Laws 1913, p. 123, §§ 6–7), empowers the board of county tax-assessors to assess property for taxation, and requires it to notify the taxpayer of changes made in his returns; it gives him, if dissatisfied, the right to demand an arbitration, and provides that a majority of three arbitrators, one appointed by him, one by the board, and the third by the two so selected, shall fix the assessment; but the arbitrators must render their decision within ten days from the naming of the arbitrator by the board, otherwise the board's decision—i. e., its assessment—stands affirmed; and no notice is afforded the taxpayer before the making of the board's assessment, nor any opportunity to be heard concerning it save that before the arbitrators. Held, that an assessment so made by the board of county tax assessors, increasing the valuation returned by a property owner, without notice or hearing, was without due process of law, where his remedy by arbitration proved abortive because the arbitrators, though agreeing that the assessment was excessive, could no two of them unite on a new assessment before the ten day limitation expired." In delivering the opinion of the court in that case Mr. Justice Day, among other things, said: "In considering cer-
67 tain sections of the Georgia tax laws this court held in Central of Georgia Ry. Co. v. Wright, 207 U. S. 127, that due process of law requires that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the validity of a tax and the amount thereof, by giving him the right to appear for that purpose at some stage of the proceedings." We do not understand that the decision of the Supreme Court of the United States goes further than to hold that where the taxpayer's remedy by arbitration proved abortive because the arbitrators, though agreeing that the assessment was excessive, and where no two of them united on a new assessment before the ten-day limitation fixed by the statute expired, under such circumstances the taxpayer was denied due process of law. But such is not this case. Section 6 of the act of 1913 does provide for hearing and an arbitration "before the tax becomes irrevocably fixed." It is true it is after the tax-assessors have raised the amount of the return made by the taxpayer. But before that amount is irrevocably fixed as the true value of his property, he is given an opportunity to appoint an arbitrator and have the tax-assessors to appoint another, and those two can appoint a third; and a majority of the assessors can, after hearing evidence, fix the true value of the property to be assessed. How this deprives a taxpayer of due process of law we are unable to see. It may be that in a case like the Turner case (254 U. S. supra), where the arbitrators failed or refused to agree, and no provision is made for another hearing, in such circumstances it could be held that there was a failure of due process. But before the taxpayer can be heard to complain, he must avail himself of the remedy which is provided by the statute. In the present case the plaintiff has not even attempted to avail himself of the remedy provided in section 6 of the act of 1913, and has not asked for an arbitration on the question as to whether the assessment of

68 his land for taxation was too high. There was no attempt to arbitrate on his part, and no failure of the arbitrators to agree, as in the Turner case.

Suppose the plaintiff has asked for an arbitration and the hearing was had in accordance with his request; that evidence was heard pro and con, and the arbitrators had rendered a judgment fixing the true value of the land of plaintiff in error at the figure at which he gave it in for taxation, or at some other figure; can it be said, in view of the authorities cited in the case of Vestel v. Edwards, and others to the same effect, that the plaintiff has been denied due process of law? We do not think so. We are of the opinion that he is provided a remedy of which he can avail himself as a matter of right, and that he can be heard before a competent tribunal and have settled and determined the question as to the true value of the land in controversy. And if he fails to take advantage of the remedy provided him, he can not complain of a want of due process of law. We are of the opinion that section 6, supra, is not obnoxious either to the Federal or the State constitution, as against the objections urged. An act may be constitutional, but if in the administration of the act those who administer it fail or refuse to perform a duty imposed upon them, it can not be said that the act itself is unconstitutional for that reason alone. It was the duty of the plaintiff to have tried out the remedy provided by section 6 of the act of 1913; and if he had tried it out and the arbitrators had failed or refused, or for honest difference of opinion had failed to agree on the matter of the true valuation of the land, *and the assessment of the Board of tax assessors was thus allowed to stand*, it might then be said, as it was said in the Turner case, that there was a denial of due process of law; and we do not understand that the decision goes further

69 than that. In the Turner case it was said that "The assessment of the board of assessors ought to have been enjoined, because section 6 of the act *as construed and applied in this* case [italics ours], denies to a complaining tax payer due process of law." No decision is broader than the facts upon which it is based, and the facts of the Turner case and those in the instant one are not alike. In the Turner case there was an appeal to arbitrators, and the arbitration failed. Here there was no effort on the part of plaintiff to avail himself of the right of a hearing before a board of arbitration; and therefore, where the right of arbitration, which includes a hearing, etc., has been conferred, and the taxpayer merely fails to avail himself of it, he can not be heard to say that he is denied due process of law.

2. The proper county authorities of Warren County made the following tax levy for the year 1920: "Sixteen dollars per thousand on $3,476.074, which will net $55,616," under which a tax fi. fa. was issued against the plaintiff, who filed a petition in equity against the sole county commissioner of Warren County under the act of 1919 (Acts 1919, p. 773), the sheriff of the county and the county tax-assessors, to enjoin the levy of the fi. fa., upon the ground that the tax levy was void because it failed to comply with §§ 513 and 514 of the Civil Code of 1910, as set out in the foregoing statement

of facts. After the filing of the petition for injunction the court made an order allowing the amendment to the tax levy, which amendment, so far as material, was as follows: "The following assessments upon the State tax for the year 1920 are levied against all taxable property in Warren County, Georgia, subject to taxation within said county for the year 1920, the same, except the tax for road purposes, support of chaingang, building and repairing jail and court-house, and support of paupers, being less than 50% of the
70 State's tax for said county, to wit: To pay legal indebtedness of the county due or to become due during the year, or past due, 9/200%. To build or repair court-houses or jails, bridges, or ferries, or other public improvements, according to contract, 11.565%. To pay sheriffs', jailors', or other officers' fees that they may be legally entitled to out of the county, 11.50%. To pay expenses of the county for bailiffs at court, non-resident witnesses in criminal cases, fuel, servant hire, stationery, and the like; 17.95%. To pay jurors a per diem compensation, 11.304%. To pay expenses incurred in supporting the poor of the county and as otherwise prescribed by this court, 12.50%."

The amendment to the tax levy also included the following: "Whereas no debt was created, the following tax is levied upon the taxable property of Warren County, Georgia, for the year 1920, for the support of the chain-gang, for machinery for road building, and for purchasing right of ways in cooperation with the State Highway Department, to wit: 245.915%, to net $42,753.32." To this judgment of the court the plaintiff excepted upon the following grounds: (*b*) Because the original statement which it was contended was a legal tax levy and subject to the proposed amendment was absolutely null and void, and could not be amended. (*c*) Because the proposed amendment to the tax levy, as allowed by the judge, was illegal in that the commissioner of roads and revenues of Warren County could not legally levy more than 100 per cent. of the State's tax to pay the accumulated debts and current expenses and four tenths (4/10) of one per cent. to build and repair the public roads of said county; whereas the proposed amended tax levy, and which was allowed by the court, did levy a tax of sixteen (16) mills in addition to the State's tax of five (5) mills, which levy was excessive and therefore illegal." Under the principle rule in the following cases the exceptions to the judge's order allowing the
71 amendment is without merit. Yow v. Sullivan, 129 Ga. 187; Garrison v. Perkins, 137 Ga. 744.

The other exceptions to the order are likewise without merit. Under the decision in the case of Sullivan v. Yow, 125 Ga. 326, the following items of the tax levy are not included in the provision of the code which requires that the grand jury shall recommend a fifty per cent additional tax (Civil Code of 1910, §508), viz: "To build or repair court-houses or jails, bridges, or ferries, or other public improvements, according to contract: 11.565%. To pay expenses incurred in supporting the poor of the county, and as otherwise prescribed by this code, 12.50%." Excluding these items from the amended tax levy in the instant case, the remaining items amount

to only fifty per cent of the State tax, exclusive of the tax of 245.-915% levied for the "support of the chain-gang, for machinery for road building, and for purchasing rights of way in co-operation with the State Highway Department." Exception is taken to the allowance of the amendment to the tax levy, on the ground that the commissioner of roads and revenues of Warren County could not legally levy more than one hundred per cent of the State's tax to pay the "accumulated debts" and current expenses and four-tenths of one per cent to build and repair the public roads of the County of Warren; whereas the proposed amended tax levy did levy a tax of 16 mills in addition to the State's tax of 5 mills, which levy was excessive and therefore illegal. The reply to this contention is that the amendment to the tax levy expressly states that there are "no accumulated debts," and that "no debt was created." In addition to the above, the four-tenths of one per cent to which exception is also taken, was not included in the amended levy. The defendants insist that the County of Warren is not working the roads of that county under the alternative road law, and therefore that the
72 four-tenths of one per cent authorized by that law to be levied is not applicable. Civil Code (1910), §696. The plaintiff in the above exception evidently relies upon §507 of the Civil Code of 1910, which provides: "When debts have accumulated against the county, so that one hundred per cent on the State tax, or the amount specially allowed by local law, cannot pay the current expenses of the county and the debt in one year, they shall be paid off as rapidly as possible, at least twenty-five per cent every year." But from what has been said above it is manifest that that section does not apply to the facts of the present case. That being so, it would seem that where any county in this State is not working its convicts under the alternative road law, but has made requisition upon the proper State authorities for its pro rata share of the convicts to be used in working the public roads of the county, and is so using them, the proper county authorities having charge of the roads and revenues of the county may levy a tax sufficient to defray the expense incurred in maintaining, keeping, and equipping such convicts so obtained from the State, in addition to other tax levies which the counties are authorized to levy, and which are set out in another part of this opinion. See Garrison v. Perkins, 137 Ga. 744, 751, 757; Acts 1908, p. 1119; Commissioners of Habersham Co. v. Porter Mfg. Co., 103 Ga. 613, 616.

3. Error is assigned because the original tax levy was neither published in any public gazette nor published at the court-house door, nor entered upon the minutes of the commissioner of roads and revenue of the County of Warren. We are of the opinion that this assignment of error is without merit. While the provisions of §§514, 515 of the Civil Code of 1910, with reference to advertising a copy of the order assessing taxes, etc., should be complied with, such provision is directory and not mandatory. Dunn v. Harris,
144 Ga. 164, 385, 389; and see Garrison v. Perkins, supra.
73 Besides the court ordered, under the amendment to the tax levy, that it should be published and entered on the minutes

as provided by §§514, 515 of the Civil Code, and this order is not specifically excepted to.

Judgment affirmed. All the Justices concur.

74 Supreme Court of Georgia.

Atlanta, May 19, 1922.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

C. E. McGregor

v.

G. P. Hogan, Sheriff, et al.

This case came before this court upon a writ of error from the superior court of Warren county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

All the Justices concur.

75 Clerk's Office, Supreme Court of Georgia.

Atlanta, Ga., June 16, 1922.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and the original citation, and also true and complete copies of the parts of the record specified in the præcipe in the case of Charles E. McGregor, plaintiff in error, vs. George P. Hogan, Sheriff of Warren County, Georgia, J. T. Scruggs, tax collector of Warren County, Georgia; D. E. Johnson, Commissioner of Roads and Revenues of Warren County, Georgia, C. A. Wheeler, H. F. Norris and G. A. Ray, Board of Tax Assessors of Warren County, Georgia, defendants in error, the same being case No. 274 October Term, 1921, of the Supreme Court of Georgia, as appears from the record and files of this office.

Witness my signature and the seal of the Supreme Court of the State of Georgia hereto affixed the day and year first above written.

[Seal of Supreme Court of the State of Georgia.]

Z. D. HARRISON,
Clerk Supreme Court of Georgia.

Endorsed on cover: File No. 28,992. Georgia Supreme Court Term No. 442. Charles E. McGregor, plaintiff in error, vs. George P. Hogan, sheriff of Warren County, Georgia, et al. Filed June 23d, 1922. File No. 28,992.

In the Supreme Court of the United States

OCTOBER TERM, 1922

No. 442

CHARLES E. McGREGOR,
Plaintiff in Error,

vs.

GEORGE P. HOGAN, Sheriff of Warren County, Georgia,
J. T. SCRUGGS, Tax Collector of Warren County, Georgia.
D. E. JOHNSON, Commissioner of Roads and Revenues of Warren County, Georgia.
C. A. WHEELER, H. F. NORRIS and G. A. RAY, Board of Tax Assessors of Warren County, Georgia.
Defendants in Error.

In Error to the Supreme Court of the State of Georgia.

BRIEF AND ARGUMENT OF L. D. McGREGOR AND VIRGIL E. ADAMS, COUNSEL IN BEHALF OF THE PLAINTIFF IN ERROR.

Abstract and Statement of the Case.

The case involves solely the constitutionality of the sixth section of what is known as the "Tax Equalization Act" of the State of Georgia.—Georgia Laws of 1913, p. 127.

This enactment is as follows:

> "Sec. 6. Be it further enacted by the authority aforesaid That the said Board of County Tax Assessors in each county shall meet each year within ten days from the date of the closing of the tax returns for the current year, to receive and inspect the tax returns to be laid before them by the Tax Receiver as hereinbefore provided. It shall be the duty of said board to examine all the returns of both real and personal property of each tax payer, and if in the opinion of the Board any tax payer has omitted from his returns any property that should be returned or has failed to return any of his property at a just and fair valuation, the said board shall correct such returns and shall assess and fix the just and fair valuation to be placed on said property and shall make a note thereof and attach the same to such returns. It shall be the duty of said board to see that all taxable property within the county is assessed and returned at its just and fair valuation and that valuations as between the individual tax payers are fairly and justly equalized so that each tax payer shall pay as near as may be, only his proportionate share of taxes. When any such corrections, changes and equalizations shall have been made by said board, it shall be the duty of the board to immediately give notice to any tax payer of any changes made in his returns, either personally or by leaving same at his residence or place of business, or in case of non-residents of the county, by sending said notice through the United States mails to his last known place of address.
>
> "If any tax payer is dissatisfied with the action of said board, he may within ten days from the giving of said notice in case of residents, and within twenty days in case of non-residents of the county, give notice to said board that he demands an arbitration giving at the same time the name of his arbitrator; the board shall name its arbitrator within

three (3) days thereafter and these two shall select a third, a majority of whom shall fix the assessments and the property on which said tax payer shall pay taxes, and said decision shall be final, except so far as the same may be affected by the findings and orders of the State Tax Commissioner as hereinafter provided. The said arbitrators shall be freeholders of the county and shall render their decision within ten days from the date of the naming of the arbitrator by said board, else the decision of said board shall stand affirmed and shall be binding in the premises. Said arbitration shall be had and the said arbitrator shall be compensated in the same manner as is now provided for the arbitration of individual tax returns, except in so far as the existing law may be modified by the provisions of this section.

"Before entering upon a hearing, the said arbitrators shall take an oath before the Tax Receiver that they will faithfully and impartially make a true and just assessment of the tax returns and property in question and will determine the matters submitted to them, according to law and justice and equity of the case."

The portion of this statute to which the constitutional objection specifically relates is that there is no provision giving to the tax payer an opportunity to be heard before the board of county tax assessors, who act ex parte, whereby the amount assessed by the board of county tax assessors becomes final and conclusive against the tax payer without any notice or an opportunity to be heard thereon.

The facts as disclosed in the record, are:

The plaintiff in error returned his property for taxation at the value $12,500.00. The County board of tax assessors, ex parte, and without hearing, raised this amount to $23,256.00. Thereupon, in pursuance of the statute, quoted above, they notified the plaintiff in error of the increase.

The plaintiff in error did not demand an arbitration, because this Honorable Court had held the arbitration clause of the above Georgia

law as unconstitutional in the case of Turner vs. Wade, Sheriff, 254 U. S. 64. 41 Sup. Ct. 26.

The tax collector demanded the taxes in accordance with the value fixed by the board of county tax assessors, namely $23,256.00. The plaintiff in error tendered the amount he considered to be due: i. e., the sum to which the taxes would amount calculated upon the sum which he had returned them as being the true market value of the property, and refused to pay the remainder. The tax collector issued execution for the taxes on this increase in value which had been imposed by the board of county tax assessors. The tax execution was delivered over to the Sheriff which he threatened to levy, thereupon the plaintiff in error brought his petition in equity to prevent the enforcement of the execution, setting up that the law by which this increase had been thus assessed against him was unconstitutional.

The judge of the Superior Court, acting as chancellor, on interlocutory hearing, held the statute to be constitutional and refused an ad interim injunction. The Supreme Court of Georgia affirmed this action of the chancellor, holding in the opinion, which appears on page 37 of the transcript of the record in this court, that the statute was not unconstitutional.

The only question involved in the case now is the one decided by the Supreme Court of Georgia and excepted to, namely:

Does the enforcement of this tax execution against the property of the plaintiff in error deprive him of his property without due process of law, the statute having provided no opportunity for hearing and decision on the question of the value of the property, before the body that finally and conclusively assessed it; that is to say, is the statuatory scheme constitutional?

Specification of Errors Relied On.

First. That the court erred in holding and deciding that the sixth section of the Tax Equalization Act of the State of Georgia, being an

Act of General Assembly of Georgia, approved August 14th, 1913, (found in the Georgia Laws for 1913 page 123 et seq.) and especially so much of said section of said act as provides, that, "When any corrections, changes and equalizations shall have been made by said board, it shall be the duty of the board to immediately give notice to any tax payer of any changes made in his returns, either personally or by leaving same at his residence or place of business, or in case of non-resident of the county, by sending said notice through the United States Mail to his last known place of address," (a decision to be made without giving the tax payer any opportunity to be heard on the question of the value of the property before the tribunal that makes the assessment of the value of the property), is not void because it is violative of that portion of the fourteenth amendment of the Constitution of the United States wherein it is provided that, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

Second. That the Court erred in affirming the judgment of the Superior Court of Warren County, Georgia, in holding that the said statute and the portion thereof complained of are constitutional and does not deprive the plaintiff of his property without due process of law.

Third. That the Court erred in holding and deciding that, not withstanding the plaintiff in error had not had an opportunity to be heard before the county board of assessors on the question of the value of his property for taxation, and notwithstanding the statute in question makes no provision for such a hearing before the county board of tax assessors, and notwithstanding this decision or finding of the county board of tax assessors which is being enforced against the plaintiff in error and his property, and notwithstanding such enforcement is in pursuance of the provision of said statute, and notwithstanding that the only provision for an appeal or review of said

decision or finding of said board of county tax assessors is by demand for an arbitration, (and which provision was decided by the Supreme Court of the United States to be unconstitutional in the case of Turner et al vs. Wade, Sheriff, at the October term, 1920, upon the 8th. day of November, 1920); and notwithstanding the statute in question makes no other exception whereby the question of the value of the property for taxation could be determined—after opportunity for hearing, and by its terms makes the ex parte decision or finding of the county board of tax assessors conclusive and binding without an opportunity to be heard by the plaintiff, and that notwithstanding all of this is in pursuance of the statute itself, and the statute is being enforced in the case presented as made, the statute and especially that portion of the same which is thus being enforced is not unconstitutional as being violative of that portion of the fourteenth amendment of the Constitution of the United States which forbids any State from making or enforcing any law which deprives any person of his property without due process of law.

Brief of the Argument.

Plaintiff's plea involves the construction of the Equalization Act, above—Georgia Laws, 1913, page 123 and particularly section 6 thereof. The particular statute was considered by this Court in, Turner vs. Wade, Sheriff 254 U. S. 64. 41 Sup. Ct. 26, where the controverted section, also there considered as decisive of the issues therein, is set forth.

The Supreme Court of Georgia, in deciding the case at bar took cognizance of the decision of the Supreme Court of the United States in Turner vs. Wade, reversing the Georgia Court's decision, but attempted to distinguish and differentiate that decision, on the ground that that case did not involve the inherent unconstitutionality of the particular section of the Georgia statute, but involved only an unconstitutional enforcement of a constitutional law growing out of the method in which it was enforced in that particular case. As the

case of Turner vs. Wade was decided on writ of error and not on certiorari we must assume that the Georgia Court is incorrect, since this Court's jurisdiction on writ of error does not arise except upon direct attack upon the constitutionality of the statute itself.

The Turner case, like all other in like premises emphasizes that provision of our organic laws, State and Federal, that, before one of us is deprived of our property, it must be accomplished in one way only, to-wit: "by due process of law."

Those cases equally emphasize the concept that due process involves a HEARING by the aggrieved party before his property is taken and taxation is a TAKING by the State, afortiori obligated to sacredly follow the limitations with which its creators—THE PEOPLE—circumscribed it. Hence, the fourteenth Amendment to the Federal and Art. 1, sec. 1, par. 3 of the Georgia Constitution respectively. Now, in the Turner case this Honorable Court finds that,

> "Nor was an opportunity given him to be heard AS OF RIGHT before the assessment was FINALLY made against him."

Just preceding the above excerpt Mr. Justice Day, who delivered the opinion in the case, in interpreting section 7 of the 1913 Georgia Laws, page 123 herein, having previously set forth and dilated upon section 6 thereof—and especially pertinent herein as in the Turner case—finds (p. 70-254 U. S. p. 29-41 Sup. Ct.)—that:

> "Therefore, looking to the sections of the statute for ourselves—having previously found that the Supreme Court of Georgia had never held that section 7 of the 1913 Act "provided for the notice and hearing required by Due Process of Law,"—"WE ARE FORCED TO THE CONCLUSION THAT, READING THE PROVISIONS TOGETHER" (i. e. Sections 6 and 7) "BEING PARTS OF ONE AND THE SAME ACT THEY CLEARLY SHOW THAT THE BOARD OF ASSESSORS WAS NOT REQUIRED TO GIVE ANY NOTICE TO THE TAX PAYER," and so owned as per the

first excerpt above beginning, "nor was opportunity etc."

Then immediately following in paragraph 3 of the opinion Mr. Justice Day, after finding that sections 6 and 7 do not give the aggrieved party the opportunity to be HEARD, concludes, (p. 70, again,)

> "In the present case, as the facts already show, the tax payer is subject to an assessment made without NOTICE AND HEARING. In that situation we are clear that the case comes within the decision of this Court in Central of Georgia v. Wright, (207 U. S. 127, 28 S. Ct. 47) etc."

What followed in the last paragraph of the opinion, and which the Supreme Court of Georgia seems to believe confines the decision to the Turner case alone—but which is true only in a limited sense—merely applies the unconstitutionality which the United States Supreme Court finds intrinsic to the Georgia Act 1913, to the FACTS IN THE TURNER CASE WHICH IT FINDS COMES WITHIN THE PERVIEW OF THAT UNCONSTITUTIONALITY. What the United States Supreme Court obviously means by the phrase, "as construed and applied in this case" is this, to-wit:

> "The facts in this case show that it comes within the provisions of an Act which we find to be unconstitutional, wherefore, etc."

This conclusion is made clear when again we consult page 70 of the opinion, where the Court, as if to emphasize the great defect that no hearing was under the Act was granted to the aggrieved party, says:

> "But provision was made for NOTICE of the assessment to the tax payer AFTER it was made, and in event of his dissatisfaction the arbitration was to afford a HEARING to him. Such HEARING was all that the statute contemplated that the tax payer should have."

Then immediately after the excerpt above quoted, and in connection with what this Honorable Court previously had stated on the

same page directing the attention to the all important fact that neither section 6 nor 7 accorded the hearing contemplated by the organic law (14th Amendment) Despite the fact that section 6 accords a hearing—IDLE it is seen—After the assessment, this Honorable Court draws its conclusion re the Act and seen to be inevitable, which it expresses in paragraph 3 of the opinion, and again to be now quoted, thus:

> "In the present case, the facts already show, the taxpayer is subject to an assessment made without notice and hearing."

And this, despite the fact that he did have the notice provided for under the arbitration section, which, by the very conclusion just stated this Court, properly, it is earnestly submitted, held, is not the notice and hearing contemplated by the organic law as so frequently similarly interpreted by this Honorable Court.

For, in the Turner case the taxpayer submitted his cause to the arbitrators, whose failure to return their finding within the ten days limited, is not made the predicate of the Court's ruling, the sole ground of the Court's ruling being, that found in the excerpt just quoted above from paragraph 3 of the opinion.

So that, when, as at bar, the taxpayer refuses to submit his cause to the arbitrators, and to which the Honorable Supreme Court of Georgia attaches all the importance, it is earnestly and emphatically. yet always respectfully submitted that, he refused solely because the final tribunal—the United States Supreme Court—had already declared that he was not obligated to so submit, the act providing therefor being found by such Court to be violative of the fundamental law of the Federal Organization to which in these premises, the constituent States are subject.

Need it be asked, what the possible use of the arbitration provided for when, in the Turner case, the arbitrators denied their function, thereby subjecting the aggrieved party to the injustice alleged by him and which the arbitration is presumtively, but so ineffectively,

pretended to correct? And the answer to this querry is what induces this Honorable Court to say, after considering the provisions of section 6 of the 1913 Act:

> "The taxpayer is subject to an assessment made without notice and hearing."

Briefly, the notice is not, under section 6 the notice and hearing the Federal organic law (14th Amendment) commands the State, thereunto authorized by all the States themselves, to give to the aggrieved party in all such cases. Mr. Justice Day bases his finding that section 6 does not provide for the hearing after notice to the aggrieved party on his interpretation of what the Supreme Court of Georgia held on that very question in

VESTAL V. EDWARDS, 143 GA., REPORT,
Page 368, 85 S. E. 187.

Mr. Justice Day says:

> "And in considering the statute" (Laws 1913, p. 123 et seq.) "we find no suggestion from the Georgia Supreme Court that a hearing was provided BEFORE THE BOARD OF ASSESSORS." (1. C. p. 69-254 U. S.; 29-41 Sup. Ct.)

That in conjunction with what Mr. Justice Day finds the Georgia Supreme Court holds re section 7 of the Act (p. 70-254 U. S.; 29-41 S. Ct. top of 2nd Col.,) induces the eminent Justice to conclude as in paragraph 3 (p. 70-254 U. S.; 29-41 S. Ct. end of col. 2)

> "In the present case, as the facts already stated show, the taxpayer is subject to an assessment made without notice and hearing."

But, even though the Georgia Supreme Court had held that section 6 provided the hearing contemplated by the Federal organic law, can it be doubted that the learned Justice would not have said the very thing he said about the holdings of the State Court on a like question, uttered by him in Central of Georgia Railway Co., vs. Wright, 207 U. S. 127, 28 S. Ct. 47, as follows:

> "Reluctant as we are to interfere with the enforcement of the tax laws of a State, we are constrained to the conclusion that this system does not afford that due process of law which adjudges upon notice and hearing and opportunity to be heard, which it was the intention of the 14th Amendment to protect against impairment by State action." ?

The question is answered by Mr. Justice Day himself, when at page 70 of the 254 U. S. p. 29 of the 41 S. Ct. he says:

> "Therefore, looking to the sections for ourselves" (because the Georgia Supreme Court had not held that the assessors were bound under the Act to give notice to the taxpayers) "we are forced to the conclusion that, reading the provisions together" (Section 6 and 7, of course) "being parts of one and the same, act, they clearly show that the Board of Assessors was not required to give notice to the taxpayer, nor was opportunity given him AS OF RIGHT before the assessment was finally made against him."

And, of course, they obviously were not, since as in the Turner case—254 U. S. supra-unless the arbitrators "shall render their decision within ten days"—no matter what the cause or how justifiable a delay beyond that period, even by one hour—"the decision of said board shall stand affirmed, etc."

So that, what the United States Supreme Court did in the Turner case, was to declare the act absolutely opposed to the 14th Amendment, not as the Supreme Court of Georgia pretends (with all respect) in its opinion herein in No. 2473, that because the arbitration proceedings were abortive in the Turner case he only was denied due process of law, the act nevertheless being valid contingent on the arbitrators making their finding within the ten days period, but opposed because, whatever the provisions for arbitration it denies the taxpayer "the opportunity to be heard as of right before the assessment (is) finally made against him."

So that, that part of the opinion in No. 2473 that holds that complainant here must have made a case by showing first an effort at

arbitration, denies all that the eminent Mr. Justice Day says about that effort in his able opinion in 254 U. S. above, the complainant there have made it to what little avail is clearly shown.

Again, as undertaken to be shown in the earlier pages of this brief, the Georgia Supreme Court misinterpreted the effect of Mr. Justice Day's language in that case by reading into it the exact antithesis of what is conveyed thereby, which is, as set out on page 3 thereof to-wit:

> "the facts in this (Turner) case show that it comes within the provisions of an Act which we find to be unconstitutional."

It—United States Supreme Court—will and, it is respectfully submitted, ought to say the same thing about this case, viz:

> "its facts come within the purview of the unconstitutionality which we find to exist in this Georgia Act of 1913."

The facts at bar being what they are, not the least of which is the decision of this Honorable Court in the Turner case and sought to be analyzed herein, can it be doubted that the later ruling by this same tribunal, in which the opinion is written by his Honor Mr. Chief Justice Taft, has a direct application to the facts in the instant case, and not the least of which is the Georgia Act of 1913, p. 123 et seq?

This is the holding:

> "While there can be no vested rights in any particular rule of common law, the LEGISLATIVE power of the STATE can ONLY be exerted in subordination to fundamental principles of right and justice, which the guaranty of due process of law in the 14th Amendment was intended to preserve, and a purely arbitrary or capricious exercise of that power, whereby a wrongful invasion of property rights is practically sanctioned and the OWNER STRIPPED OF ALL REAL REMEDY, is at variance with these principles."
>
> "Due process of law required that every man shall have the protection of HIS DAY IN COURT and the benefit of the

> general law, WHICH HEARS BEFORE IT CONDEMNS AND PROCEEDS NOT ARBITRARILY BUT UPON INQUIRY, and renders judgment only after trial."
>
> Truax v. Corrigan, 42 S. Ct. Rep. 124.

The last paragraph of the citation is exactly what Mr. Justice Day meant when in the Turner case he said:

> "in the present case, as the facts already stated show, the taxpayer is subject to an assessment made WITHOUT NOTICE AND HEARING."

What are the facts alluded to by Mr. Justice Day? Not, obviously that the taxpayer did not have notice from the assessors as to the amount they had assessed against him, for he did get that; nor that he did not have a hearing before the arbitrators, for he must have had that, for a reading of the case in 254 U. S. supra, will show. But, THAT HE DID NOT HAVE THE NOTICE AND HEARING FROM AND BEFORE THE BOARD OF ASSESSORS BEFORE IT FIXED THE AMOUNT ASSESSED AGAINST HIS PROPERTY. That is, Mr. Justice Day finds and truthfully, that the facts of the 1913 Georgia Act are that the taxpayer is "subject to an assessment made without notice and hearing BY THE BOARD," alone empowered to make that assessment, the arbitrators function as in the Turner case being seen to be an idle process, thereby taking away from the taxpayer the opportunity to be heard, to have his day in Court, insured to him by the 14th Amendment to the Federal organic law. It follows that the decision of Mr. Justice Day in the Turner case, and that of Mr. Chief Justice Taft in the Truax Case, as epitomized in the second paragraph of the excerpt therefrom on page 6 hereof, are applicable to the facts in this case now before this Honorable Court as both the foregoing were to the facts in those cases.

In this connection counsel trust that it will not be amiss to refer to a definition of the common law made by the Lord Chancellor of England at a recent dinner at the ancient hall of the Middle Temple in

London, at which the learned Chief Justice of the United States was an honored guest; the Lord Chancellor said, in proposing a toast to the guest that, "the common law is the machinery by which a man might defend himself for his rightful actions." If Our Union subscribes, as, it is submitted it does subscribe to that common law of England, and on which the organic law of Our Federation and its constituent units is posited, then this complainant justifies on that premise his refusal to submit to the arbitration provided for in the 1913 Georgia Act, submitting himself nevertheless to the command of this tribunal, part of the machinery above adverted to by the eminent Lord Chancellor of England, for such performance by him as it may find proper to order in the premises.

> "Within the constitutional provision requiring due process of law, or its equivalent, the law of the land, a statute duly enacted by the legislature, is not necessarily the law of the land if it is so arbitrary and capricious as to deprive the citizen of fundamental rights guaranteed by the constitution." Pauly v. Keebler, 185 N. W. 554 (Wis. S. Ct. 1921.)

The Supreme Court of Georgia in the instant case (see judgment and opinion in the record) by its judgment penalizes the complainant for his refusal or failure to demand an arbitration as provided for in Georgia Laws 1913 page 123 et seq. Complainant could not be so penalized, because, this Honorable Court had already decided that the arbitration feature of the Georgia law, supra, was unconstitutional, resulting in absolutely nullifying said law, to the extent that it was no more applicable to the complainant than if it had never in fact been enacted.

Citing Cooleys Constitutional Limitations, 5th Edition, page 224, (par. 188) as follows:

> "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes no protection to any one who has acted under it, and no one can be PUNISHED for having refused

obedience to it before the decision was made. And what is true of an act void in toto it is true also as to any part of an act which is found to be unconstitutional, and which consequently, is to be regarded AS HAVING NEVER, AT ANY TIME, been possessed of any legal force."

Citing the case of Hirsh v. Block, 267 Federal Reporter, page 614 wherein it is held:

"An unconstitutional act is not a law, confers no right, affords no protection, creates no office, and is, in legal contemplation, as inoperative as though it had never been passed."

The Supreme Court of Georgia has adhered to this principle of law, for it was held in the case of Green et al v. Hutchison, Tax Collector, 128 Georgia Supreme Court Report, page 379, (2,) as follows:

"A legislative act of a general nature, and intended to have uniform operation throughout the State, duly adjudicated to be unconstitutional and inoperative, cannot be given effect in any part or subdivision of the State or of any County. An unconstitutional act of the legislature is not law."

Complainant closes his case believing that no more can be offered in the premises than has already been so finally presented in the Turner and Truax cases above, where this Honorable Court may have all the light possible to be shed upon the question at issue.

All of which is respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1922

No. 442

CHARLES E. McGREGOR,
Plaintiff in Error,

vs.

GEORGE P. HOGAN, Sheriff of Warren County, Georgia,
J. T. SCRUGGS, Tax Collector of Warren County, Georgia,
D. E. JOHNSON, Commissioner of Roads and Revenues of Warren County, Georgia,
C. A. WHEELER, H. F. NORRIS and G. A. RAY, Board of Tax Assessors of Warren County, Georgia,
Defendants in Error.

In Error to the Supreme Court of the State of Georgia.

BRIEF AND ARGUMENT OF E. P. DAVIS AND GEO. M. NAPIER, ATTORNEY-GENERAL OF GEORGIA, FOR DEFENDANTS IN ERROR

In this suit, the plaintiff is seeking relief by alleging that Section 6 of the Tax Equalization Act of Georgia (Acts of the General Assembly 1913, page 123), is violative of the due process of law clause of the Constitution of the United States. He is seeking to enjoin the collection of certain taxes levied against him in compliance of the Act, which he attacks as unconstitutional. Before discussing the Act in question and whether he is entitled to the relief which he seeks because said Act is unconstitutional, we desire to call the Court's attention to one feature of the case which we think is controlling, even if the Court should agree with the plaintiff that the entire Section 6 of the Act is uncoustitutional. Plaintiff sets out in his petition that he returned for taxation in 1920 in Warren County, Georgia, 2,907 acres of land at $12,500, which he alleges was the true market value thereof. He alleges that without any notice to him, the Tax Assessors of Warren County raised this assessment to $23,256. He was duly and legally notified of this increase in his assessment by the local Tax Assessors of the County. He made no demand for arbitration, as provided for in the Act, nor did he make any other formal or informal objection to this increase in his assessment. So, in accordance with the statute, the Tax Receiver of the County, after the expiration of ten days in which plaintiff had the right to demand an arbitration, entered on his digest the assessment of $23,256 made by the Tax Assessors of the County. In the fall, when the taxes became delinquent and the plaintiff in error had failed and refused to pay his taxes, the Tax Collector of the County of Warren issued a fi fa against plaintiff in error for the full amount of his taxes based on the assessment made by the Tax Assessors of the County, and this fi fa included the State tax of five mills; and this fact is shown by the evidence in the case. The plaintiff in error, without paying or tendering any portion of his taxes, filed his bill to enjoin the collection of the same and secured a temporary restraining order from the Judge. This restraining order on the hearing before the Judge was revoked on condition that the County Commissioner

amend his levy, which he did. It is shown by the evidence that the execution issued against the plaintiff in error includes the State tax of five mills, about which there was never any dispute, as it is fixed by the statute. We say the plaintiff is not entitled to equity until he does equity. He made no payment or tender of the taxes admitted to be due before the bill was presented to the Judge and the temporary restraining order was obtained from the Court. We take sharp issue with the statement of counsel for plaintiff in error on the fourth page of their brief, to the effect that the plaintiff in error tendered the amount he considered to be due calculated upon the sum which he had returned as being the true market value of the property, and we assert that the record nowhere discloses that any tender was made. Counsel for plaintiff say in their brief:

> "The Tax Collector demanded the taxes in accordance with the value fixed by the board of County Tax Assessors, namely, $23,256.00. The plaintiff in error tendered the amount he considered to be due, i. e., the sum to which the taxes would amount, calculated upon the sum he had returned them as being the true market value of the property, and refused to pay the remainder. The Tax Collector issued execution for the taxes on this increase in value * * *. The tax execution was delivered over to the Sheriff which he threatened to levy, thereupon the plaintiff in error brought his petition in equity to prevent the enforcement of the execution, etc."

There is not a semblance of testimony in the record that any tender was ever made by the plaintiff before he filed his bill of injunction. On the contrary, the record is absolutely silent on that subject and the defendant stressed the point before the trial Court and before the Supreme Court of Georgia that plaintiff in error was not entitled to the injunction until he paid or tendered all the taxes he admitted to be due. Both the Superior Court, however, and the Supreme Court of Georgia decided the constitutional question involved in the case adversely to the plaintiff in error and without referring to the

question of tender or payment. The only portion in the record which in any way refers to a tender or payment by the plaintiff is in Section 17 of his petition, where he says:

> "Your petitioner now tenders such legal amount to the officers above set forth in payment of his taxes for the year 1920, which amount petitioner is unable to specify because the amount is not capable of being ascertained, but your petitioner refuses to pay the illegal amount demanded of him $838.03."

He does not allege that any tender was made before he presented his bill and secured the restraining order. No such tender was ever made. In paragraph three of plaintiff's amendment, he amends paragraph seventeen of the original petition by striking the following words:

> "is unable to specify because the amount is not capable of being ascertained,"

and alleging in lieu thereof the following:

> "alleges as being due by him for taxes for the year 1920 upon all the property as returned by your petitioner for taxation is $407.10, at the rate of fourteen mills, including the State tax of five mills, and which amount we now tender in payment of taxes for the year 1920, as the County Commissioner had no legal authority to assess your petitioner more than one hundred percent of the State tax to pay the accumulated debts and current expenses, and 4-10 of 1 per cent. to work the roads and build and repair bridges in and for said County for the year 1920."

The Superior Court and the Supreme Court of Georgia found against plaintiff's contention that 14 mills, including the State tax, was all that the County Commissioner could legally assess against him, and this ruling is now not up for review. Even this alleged vague tender was not made until the case was on trial and long after the bill was filed and the restraining order obtained. There was never a moment when the plaintiff did not know that he owed five mills to the

State on the $12,500, returned by himself, nor was there any time when he did not know that he owed the entire amount assessed against him, based on his own return of $12,500. It was the alleged excess amount of his return made by the Tax Assessors that he was contesting. We say that he was and is not entitled to relief unless and until he had distinctly and legally tendered the amount admitted to be due, or which could have been ascertained to be due, and without demanding a receipt in full, and this tender must have been made before the case was presented, and the proof must show it. It cannot be made during the trial of the case. Such a tender was not made, and the proof shows that it was not made.

In a leading case on this subject, Taylor vs. Secor, 92 U. S. 575, the Court, in the fourth headnote says:

> "Tender. No injunction preliminary or final can be granted to stay collection of taxes until it is shown that all the taxes conceded to be due, or which the Court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered without demanding a receipt in full."

In the case of Miller vs. Jesup, 92 U. S. 618:

> "It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due, they must first pay what is conceded to be due or what can be seen to be due on the face of the bill or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted * * * * If the proper officer refuses to receive a part of the tax, it must be tendered and tendered without the condition annexed of a receipt in full for all the taxes

assessed."

To the same effect is the opinion in the case of Kohlhamor vs. Smietanka, 239 Fed. Rep. 411, from the U. S. District Court for the Northern District of Illinois. The above cited case of Taylor et al. vs. Secor, et al., is cited approvingly, with the following observation of the Court:

> "Asking relief of a Court of equity, plaintiff must come with clean hands. Seeking equity, he must do equity. Having admitted that he has failed to pay the Government tax past due * * * * * he must be denied the relief here sought."

To the same effect, Singer S. M. Co. vs. Cooper, 61 Fed. 635, from the U. S. District Court for the Southern District of Ohio.

Same case to similar effect found in 263 Fed. Rep. 998:

> "One to have equity must do equity. The injunction will be granted only upon terms that plaintiff has paid for the years in question the taxes assessed upon the admitted value of the undisputed assessment."

* * * * * * * * * * * * * * *

The suit is an attack upon the constitutionality of Section 6 of the Tax Equalization Act of the State of Georgia, Acts of the General Assembly 1913, page 123. Section 6 is as follows:

> "Sec. 6. Be it further enacted by the authority aforesaid, That the said Board of County Tax Assessors in each county shall meet each year within ten days from the date of the closing of the tax returns for the current year, to receive and inspect the tax returns to be laid before them by the Tax Receiver as hereinbefore provided. It shall be the duty of said board to examine all the returns of both real and personal property of each tax payer, and if in the opinion of the Board any tax payer has omitted from his returns any property that should be returned or has failed to return any of his property at a just and fair valuation, the said board shall correct such returns and shall assess and fix

the just and fair valuation to be placed on said property and shall make a note thereof and attach the same to such returns. It shall be the duty of said board to see that all taxable property within the county is assessed and returned at its just and fair valuation and that valuations as between the individual tax payers are fairly and justly equalized so that each tax payer shall pay as near as may be, only his proportionate share of taxes. When any such corrections, changes and equalizations shall have been made by said board, it shall be the duty of the board to immediately give notice to any tax payer of any changes made in his returns, either personally or by leaving same at his residence or place of business, or in case of non-residents of the county, by sending said notice through the United States mails to his last known place of address.

"If any tax payer is dissatisfied with the action of said board, he may within ten days from the giving of said notice in case of residents, and within twenty days in case of non-residents of the county, give notice to said board that he demands an arbitration giving at the same time the name of his arbitrator; the board shall name its arbitrator within three (3) days thereafter and these two shall select a third, a majority of whom shall fix the assessments and the property on which said tax payer shall pay taxes, and said decision shall be final, except so far as the same may be affected by the findings and orders of the State Tax Commissioner as hereinafter provided. The said arbitrators shall be freeholders of the county and shall render their decision within ten days from the date of the naming of the arbitrator by said board, else the decision of said board shall stand affirmed and shall be binding in the premises. Said arbitration shall be had and the said arbitrator shall be compensated in the same manner as is now provided for the arbitration of individual tax returns, except in so far as the existing law may be modified by the provisions of this section.

"Before entering upon a hearing, the said arbitrators shall take an oath before the Tax Receiver that they will faithfully and impartially make a true and just assessment of the tax returns and property in question and will deter-

mine the matters submitted to them, according to law and justice and equity of the case."

It is alleged by plaintiff in error and urged by him that Section 6 of this Act is

> "violative of that portion of the Fourteenth Amendment of the Constitution of the United States which provides no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

We understand plaintiff's contention to be that the denial of the right of the tax payer to appear before the Tax Assessors before they make their assessment renders said section of the Act unconstitutional. The fact that the tax payer after the Assessors have assessed the amount of his taxes has the right to object to the assessment and have the same arbitrated, as we understand plaintiff's contention, does not relieve the Act from the constitutional defect. It fails to give the tax payer notice and a right to be heard before the Assessors act and therefore it denies to the plaintiff due process of law, is his contension. This Tax Equalization Act of Georgia has been before the Supreme Court of Georgia several times and in each case the constitutionality of the Act has been upheld.

Vestal vs. Edwards, 143 Ga. 368.
Wade vs. Turner, 147 Ga. 666.
Barnes vs. Watson, 148 Ga. 822
Ogletree et al vs. Woodward et al, 150 Ga. 691.

In a tax act, it is not necessary to the constitutionality of the act that notice and an opportunity to be heard be given before the Tax Assessors act upon the assessment. It is sufficient if the tax payer be given notice and the right to be heard before the tax be finally fixed and determined. It is true that Section 6 of the Tax Equalization Act of Georgia gives the tax payer no right or opportunity to be heard before the Tax Assessors or Equalizers act upon

his return, but if the Tax Assessors or Equalizers change or increase the return of the tax payer, it is the duty of the Board of Assessors to immediately give notice to the tax payer of such change, either personally or by leaving same at his residence or place of business, or in case of non-residence of the County by sending said notice through the United States mails to his last known place of address. If the tax payer is dissatisfied with the action of the Board of Assessors, he may within ten days from the giving of said notice in case of residence, and within twenty days in case of non-residence of the County, give notice to said Board that he demands an arbitration, giving at the same time the name of his arbitrator and the Board shall name its arbitrator within three days thereafter and these two shall select a third, a majority of whom shall fix the assessment and the property on which the tax payer shall be taxed, and said decision shall be final except so far as the same may be affected by the findings and orders of the State Tax Commissioner. This arbitration shall be had and said arbitrators compensated in the same manner as now provided for the arbitration of individual tax returns, except so far as the existing law is modified by the provisions of this Section. The provisions of the Georgia law relative to the arbitration of individual tax returns are found in the First Volume of the Georgia Code, Section 1097, et seq. The amount of the assessment is not finally fixed and determined until after the arbitrators selected as the Act provides make their assessment. The tax payer has a right to appear before the Arbitrators and make his complaint and he is thus not denied a hearing. If he avails himself of this opportunity he has no right to complain, unless the arbitration proves abortive, as it did in the Turner-Wade case. If he does not avail himself of this opportunity as provided in the Act, he has no right to complain.

In Gray on "Limitations on Taxing Power and Public Indebtedness," Section 1161, page 577, the author says:

"Where before the assessment becomes final an opportu-

> nity is given to appear and make proofs before a Board of Commissioners or a Board of Equalization having authority to hear complaints and proofs and make correction of the assessment, the opportunity is sufficient."

In note 81, page 577, the author cites many authorities to support the above text.

In matters of taxation, due process of law does not require a judicial procedure. Judson on Taxation, 2nd Edition, page 340.

The act of the arbitrators in revising or modifying the act of the assessors is not a judicial procedure, but no judicial procedure is required, but the right to appear before the arbitrators of the tax payer and make his complaint does afford him a right to be heard before the amount is finally fixed and determined.

Plaintiff in this case made no effort to avail himself of the remedy provided in the Act. He did not select an arbitrator and notify the Tax Assessors to select one, so that these two might select a third, who would constitute a Board of Arbitration before whom he could make his complaint and secure relief. He should be estopped from saying the Act affords no remedy or hearing because he made no effort to test its provisions. One should not be permitted to call in question the remedial provisions of an Act unless he has tested these provisions. If plaintiff in error had availed himself of the remedy provided for in the Act, he would have secured relief, if he had had a just cause of complaint.

We contend that the plaintiff in error had the opportunity regularly allowed him under the laws of the State of Georgia to submit any reasons why his tax assessments were too high. There was a proper tribunal to hear his complaint; he had notice before final action was taken; and final action was taken only after he failed to complain. Thus he was accorded due process of law.

Counsel for plaintiff relies on the case of Turner vs. Wade, 254 U. S., page 64, to support his contention in this case—that the sixth

section of the Equalization Act is unconstitutional because it does not provide for notice to the tax payer before the assessors raise the return. We do not so understand the Wade case. In that case the Court was dealing with that provision of the Equalization Act which provides that, if the arbitrators fail to render their decision in ten days from the date of the naming of the arbitrator by the Board, the decision of the Board shall stand affirmed and be binding in the premises. In the Turner-Wade case the tax payer tested the Act out; he appointed his arbitrator, the assessors appointed one and these two selected a third. They all agreed that the assessment made by the assessors was too high but they failed to agree on an amount and after ten days the arbitrators failing to agree and making no further effort to agree, the Tax Collector demanded the taxes according to the valuation fixed by the assessors. The Court was dealing with the Act as it was sought to be applied in that case. No decision is extended beyond the facts on which it is based. So, as we construe the Turner-Wade case, it is only that provision of the Act which provides that if the arbitrators fail to agree within ten days, the decision of the Board shall stand affirmed, which the Court held to be violative of the due process clause of the Constitution. The Supreme Court of Georgia in the case of Ogletree, et al. vs. Woodward, et al., 150 Georgia 691, so construing the case of Turner vs. Wade, 254 U. S., page 697, says:

> "The Supreme Court of the United States held that Section 6 of the Act in question as construed and applied in the case under consideration denied to the complaining tax payer due process of law. The particular provision of the Act effected by the decision of the Supreme Court of the United States is as follows: 'else the decision of said board shall stand affirmed and shall be binding in the premises.' In that case the tax payer demanded an arbitration. Arbitrators were selected as provided in the Act. The arbitrators could not agree, though all the arbitrators believed the assessment as made by the Board of County Tax Assessors too high * * * * * the decision of the Supreme Court of the Uni-

ted States, as we construe it, merely holds that the statutory requirement quoted above is unconstitutional. The main purpose of the statute not being effected by the unconstitutionality of the particular provision, the whole Act is not thereby defeated."

After striking out the offending part of the Act, there will remain a consistent taxing scheme of the State with the right of the tax payer to have his return arbitrated, if it has been raised by the tax assessors and if he demands the arbitration.

It is now the well settled principle of constitutional construction in this State that unless the main purpose of the statute or one of its provisions is effected by the unconstitutionality of the particular part, the whole Act or provision is not thereby defeated.

Leonard vs. American Life & Annuity Company, 139 Ga. page 279.
Lee vs. Tucker, 130 Ga. 430-50.
Bennett vs. Wheatley, 154 Ga. 591.
To similar effect, Poindexter vs. Greenhow, 114 U. S., page 270.

We, however, think that the above principle is so well established that further citation of authorities is unnecessary.

We believe that upon mature consideration by the Court of the foregoing brief and argument that this Court will be constrained to hold that the plaintiff in error has been denied no right, and that the laws of the State of Georgia under which the tax involved in this case was assessed should be upheld and enforced.

Respectfully submitted,

P. O. Address:
Warrenton, Ga.

E. P. Davis

Atlanta, Ga.

George M. Napier
Attorney General of Georgia
Counsel for Defendants in

In the Supreme Court of the United States

OCTOBER TERM, 1922

No. 442

CHARLES E. McGREGOR,
Plaintiff in Error,

vs.

GEORGE P. HOGAN, Sheriff of Warren County, Georgia,
J. T. SCRUGGS, Tax Collector of Warren County, Georgia,
D. E. JOHNSON, Commissioner of Roads and Revenues of Warren County, Georgia,
C. A. WHEELER, H. F. NORRIS and G. A. RAY, Board of Tax Assessors of Warren County, Georgia,
Defendants in Error.

In Error to the Supreme Court of the State of Georgia.

REPLY BRIEF AND ARGUMENT OF L. D. McGREGOR AND VIRGIL E. ADAMS, COUNSEL IN BEHALF OF THE PLAINTIFF IN ERROR

Reply Brief to the Question of Tender.

Counsel for the defendants in error practically devotes one half of their brief to the question that no payment or tender of the taxes admitted to be due was made by the plaintiff in error before the filing of his petition, and for this reason he should be denied the relief prayed for.

It is respectfully submitted that it was alleged in the original petition and the amendment thereto as filed by the plaintiff in error, as follows:

> "Your petitioner now tenders such legal amount to the officers above set forth in payment of his taxes for the year 1920, which amount petitioner alleges as being due by him for taxes for the year 1920, upon all the property as returned by your petitioner for taxation is $407.10, at the rate of fourteen mills, including the State tax of five mills, and which amount we now tender in payment of taxes for the year 1920". Page 23 of the record, paragraph 17 and page 24 of the record, paragraph 3.

It also appears upon page 16 of the record that the plaintiff in error introduced into evidence his sworn petition and the sworn amendment thereto, as provided for by the laws of the State of Georgia and thereby becomes a part of the evidence in the case.

It is respectfully submitted, that, in so far as the record before this Honorable Court in this case, it does not appear that any point or question was ever raised by counsel for the defendants in error before the trial Court or the Supreme Court of Georgia, that no legal tender was made and therefore plaintiff is not entitled to the relief sought.

It would have been proper for the defendants in error to have filed a special demurrer to the petition and its amendment raising such question, but it was not done, and it is respectfully submitted that it is now too late to raise such question, especially when the record is absolutely silent thereon.

Defendants in error having failed to raise the question by special demurrer, such question resolved itself into a question of fact.

The Court of Chancery in Warren County, Georgia, decided the case upon its merits, thereby necessarily holding that under Chancery Court practice in Georgia a legal tender had been made and proved.

The Supreme Court of Georgia, decided the case upon its merits, thereby deciding that in so far as the practice in a Court of Chancery in Georgia regarding this equitable case, the plaintiff in error had made and proved such a tender as entitled him to have the merits of the case passed upon.

The question of tender having resolved itself into a question of fact, which was decided against the contention of the defendants in error in the Court of Chancery of Georgia, and the Supreme Court of Georgia, such a finding is binding upon this Honorable Court as held in the case of Egan vs. Hart, 165 U. S. 188, 41 L. ed. 680, wherein Mr. Justice White speaking for the Court said.

> "Not only the very nature of a writ of error, but also the rulings of this Court from the beginning, make it clear that on error to a State Court in a chancery case, as in a case of law, when the facts are found by the Court below, this Court is concluded by such findings".

This decision has since been followed in the case of E. Bement & Sons vs. National Harrow Co., 186 U. S. 70, 40 L. ed. 1058.

The question of tender is one peculiarly within the jurisdiction of the State Court and in which in itself no Federal question is involved.

Respectfully submitted,

L. D. McGREGOR,
VIRGIL E. ADAMS,
Attorneys for Plaintiff in Error.